(8)

Supreme Court, U.S.
FILED
DEC 16 1997
CLERK

No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

58 pp

QUESTIONS PRESENTED

In accordance with the National Forest Management Act of 1976, the United States Forest Service developed a Land and Resource Management Plan (LRMP) for the Wayne National Forest. Respondents filed suit to challenge the plan, contending that it overemphasized timber harvesting at the expense of other uses of the forest and improperly relied on clearcutting as the primary method of harvesting. The court of appeals held that the case was justiciable and that the Forest Service had acted arbitrarily and capriciously in devising the plan. This case presents the following questions:

1. Whether respondents' challenge to the Wayne LRMP presents a justiciable controversy.

2. Whether the court of appeals erred in holding that the LRMP at issue in this case was inconsistent with applicable legal requirements.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Summary of argument	15
Argument:	
I. The provisions of the Land and Resource Management Plan for the Wayne National Forest that are the subject of this lawsuit are not justiciable in the context of a facial challenge	16
A. Principles of both standing and ripeness serve to ensure that litigation against the government is not brought prematurely and that disputed legal issues are considered in a concrete setting	17
B. Respondents' suit should be dismissed because the challenged provisions of the Wayne LRMP are not ripe for review	22
1. The provisions of the Wayne LRMP challenged by respondents do not authorize or require the Forest Service to undertake any site-specific activity without further consideration of its environmental effects	27
2. Respondents cannot establish the existence of a ripe controversy simply by demonstrating that the challenged plan provisions will influence the general course of the agency's superintendence of the Wayne National Forest	31
3. The affidavits submitted by respondents in the district court on remand do not render respondents' plan-level challenge suitable for adjudication	41

Argument—Continued: Page

II. The court of appeals erred in holding that the LRMP at issue in this case was inconsistent with legal requirements 43
A. Nothing in the National Forest Management Act prohibits the Forest Service from using evenaged management as the primary method of timber harvesting within a particular forest 45
B. The Forest Service adequately explained and supported the timber harvesting projections contained in the Wayne LRMP 46

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 19, 21, 25, 41
Allen v. *Wright*, 468 U.S. 737 (1984) 17, 18
American Trucking Ass'ns v. *ICC*, 747 F.2d 787 (D.C. Cir. 1984) 37, 38
Ashwander v. *TVA*, 297 U.S. 288 (1936) 25
Bennett v. *Spear*, 117 S. Ct. 1154 (1997) 19, 24, 25, 26
Buckley v. *Valeo*, 424 U.S. 1 (1976) 19
Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339 (1892) 18
Harrison v. *PPG Indus.*, 446 U.S. 578 (1980) 20
Heckler v. *Ringer*, 466 U.S. 602 (1984) 35
Idaho Conservation League v. *Mumma*, 956 F.2d 1508 (9th Cir. 1992) 13
Laird v. *Tatum*, 408 U.S. 1 (1972) 18
Lewis v. *Casey*, 116 S. Ct. 2174 (1996) 18, 38, 43
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 19, 20, 23, 26, 34

Cases—Continued: Page

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 20, 21, 23, 32, 33, 34, 38
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 25
Martin v. *OSHRC*, 499 U.S. 144 (1991) 37
National Mining Ass'n v. *United States Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995) 20
Raines v. *Byrd*, 117 S. Ct. 2312 (1997) 19, 25
Reno v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) 19, 25, 26, 34, 41
Sierra Club v. *Dombeck*, No. C2-92-249 (S.D. Ohio Sept. 5, 1997) 14
Sierra Club v. *Espy*, 38 F.3d 792 (5th Cir. 1994) 45
Sierra Club v. *Robertson*, 28 F.3d 753 (8th Cir. 1994) 4, 12, 32, 43
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 19
Socialist Labor Party v. *Gilligan*, 406 U.S. 583 (1972) 19
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 19, 37, 41
United States Dep't of State v. *Ray*, 502 U.S. 164 (1991) 49
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 18, 19
Vander Jagt v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983) 17-18
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 34, 36
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 19, 24
Wilderness Society v. *Alcock*, 83 F.3d 386 (11th Cir. 1996) 32-33, 43

Constitution, statutes and regulations: Page

U.S. Const. Art. III 17, 18, 19, 23, 24, 25, 26
Administrative Procedure Act:
5 U.S.C. 553 33
5 U.S.C. 701 *et seq.* 4
Clean Air Act, 42 U.S.C. 7607(b) 20
Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 212(e), 108 Stat. 3211 35
Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. II, 104 Stat. 1942 (1990) 40
Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, Tit. II, 105 Stat. 1018 (1991) 4
Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374 (1992):
Tit. II, 106 Stat. 1401 40
Tit. III:
§ 322, 108 Stat. 1419 (16 U.S.C. 1612 note) 4, 35
§ 322(d)(4), 108 Stat. 1420 (16 U.S.C. 1612 note) 4
Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. II, 107 Stat. 1403 (1993) 40
Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, Tit. II, 108 Stat. 2524 (1994) 40
Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-185 40
Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, Tit. II, 110 Stat. 3009-208 (1996) 40
Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. II, 111 Stat. 1576-1577 (1997) 40

Statutes and regulations—Continued: Page

Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1601 *et seq.* 2
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3
42 U.S.C. 4332 9
National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 2
16 U.S.C. 1604(a) 2
16 U.S.C. 1604(d) 2, 33
16 U.S.C. 1604(e) 2
16 U.S.C. 1604(f) 2
16 U.S.C. 1604(f)(5)(A) 3
16 U.S.C. 1604(g)(1) 3
16 U.S.C. 1604(g)(3)(F) 44
16 U.S.C. 1604(g)(3)(F)(i) 5
16 U.S.C. 1604(g)(3)(F)(i)-(v) 46
16 U.S.C. 1604(g)(3)(F)(v) 5, 13, 43, 45-46
16 U.S.C. 1604(i) 3
16 U.S.C. 1604(k) 3, 7, 28
Outer Continental Shelf Lands Act, 43 U.S.C. 1349(c)(3) 20
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6976 20
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1276(a) 20
Toxic Substances Control Act, 15 U.S.C. 2618 20
36 C.F.R.:
Pt. 215 4
Pt. 217 7
Pt. 219:
Section 219.1(a) 2
Section 219.1(b) 2, 31
Section 219.3 3
Section 219.10(d) 7
Section 219.10(g) 3
Section 219.11(c) 2
Section 219.11(d) 2
Sections 219.13-219.27 2

Regulations—Continued:	Page
Section 219.14	3, 28
Section 219.16	3
Section 219.19	3
Section 219.23	3
Section 219.24	3
Section 219.26	3
Miscellaneous:	
143 Cong. Rec. (daily ed. Oct. 3, 1997):	
p. S10,323	26
pp. S10,327-S10,328	26
53 Fed. Reg. (1988):	
p. 26,832	4, 29
p. 26,836	3
58 Fed. Reg. (1993):	
p. 19,369	1-2
p. 19,370	4
pp. 19,370-19,371	4
p. 58,904	4
Memorandum from F. Dale Robertson, Chief of the Forest Service, to Regional Foresters and Station Directors, Re: Ecosystem Management of the National Forests and Grasslands (June 4, 1992)	40
S. 1253, 105th Cong., 1st Sess. (1997)	26

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-16

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 105 F.3d 248. The opinion of the district court granting summary judgment (Pet. App. 10a-48a) is reported at 845 F. Supp. 485. An earlier opinion of the district court (Pet. App. 49a-65a) is unreported. The decisions of the Chief of the United States Forest Service (Pet. App. 66a-77a, 78a-130a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. Petitions for rehearing were denied on April 7, 1997. Pet. App. 131a-132a. The petition for a writ of certiorari was filed on July 1, 1997, and was granted on October 20, 1997. 118 S. Ct. 334. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg.

19,369 (1993). Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMPs or forest plans] for units of the National Forest System." 16 U.S.C. 1604(a). The Act directs the Secretary to "provide for public participation in the development, review, and revision of land management plans," 16 U.S.C. 1604(d), and establishes certain criteria to which LRMPs must conform, 16 U.S.C. 1604(e) and (f).

Under current Forest Service regulations, forest plans in large part furnish overall programmatic guidance for the management of the forest, although particular provisions may have an immediate impact on concrete, on-the-ground activities. Forest plans are intended to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). They "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. 219.1(b). The plans "determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management." *Ibid.* An LRMP includes forest-wide management standards and guidelines, 36 C.F.R. 219.13-219.27, and establishes management area prescriptions applicable to future activities in each area of the forest, 36 C.F.R. 219.11(c). An LRMP must also include monitoring and evaluation requirements designed to provide a basis for evaluating the effects of the management practices established by the plan. 36 C.F.R. 219.11(d).

The standards and guidelines and the management area prescriptions govern the Forest Service's decisions with

respect to individual timber harvesting or other ground-disturbing projects. Forest Service regulations require the agency to maintain the viability of existing species, 36 C.F.R. 219.19, and to provide for "diversity of plant and animal communities and tree species," 36 C.F.R. 219.26. LRMPs are also required to address water and soil resources, 36 C.F.R. 219.23, and cultural and historic resources, 36 C.F.R. 219.24. Plans also are required to identify those areas of the forest "not suited for timber production," 16 U.S.C. 1604(k); 36 C.F.R. 219.14, and to establish the maximum allowable sale quantity (ASQ) of timber for a forest over the life of a plan, 36 C.F.R. 219.16.[1] Forest plans must be prepared in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (see 16 U.S.C. 1604(g)(1)), and must be revised at least every 15 years. 16 U.S.C. 1604(f)(5)(A); 36 C.F.R. 219.10(g).

The NFMA provides that "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i). If a proposed site-specific activity is not consistent with the forest plan, the Forest Service may "[m]odify the proposal to make it consistent with the forest plan"; "[r]eject the proposal"; or "[a]mend the plan to permit the proposal." 53 Fed. Reg. 26,836 (1988). As to those activities about which a plan provides only programmatic guidance, however—in contrast to any on-the-ground activities that are directly affected by the plan itself—the fact that a proposed activity is consistent with the applicable LRMP does not mean that it will actually go forward, or that it can be undertaken without further scrutiny. Rather, when an individ-

---

[1] ASQ is defined as the "quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3.

ual project (such as a timber sale) is proposed, the agency undertakes an individualized assessment of its likely environmental effects and renders a formal decision regarding it. See *id.* at 26,832; 58 Fed. Reg. 19,370-19,371 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758 (8th Cir. 1994).[2] The Forest Service is required by statute to provide opportunities for public notice and comment, along with a right of administrative appeal, for all "proposed actions of the Forest Service concerning projects and activities implementing [LRMPs]." Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note); see 58 Fed. Reg. at 19,370 ("With section 322 of the Act, Congress recognizes that critical decisions irretrievably committing resources generally occur at the project level of decisionmaking."). The agency's final decision on the proposed project is then subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*[3]

2. The Forest Service is authorized by the NFMA to utilize both "evenaged" and "unevenaged" timber harvesting techniques. An "evenaged" technique is one "aimed at creating a regeneration of trees which are essentially the

---

[2] The Forest Service has substantial discretion to include provisions in a plan or a plan amendment that are to be applied immediately to site-specific activities. The instant case, however, presents no question concerning the application of such provisions.

[3] Section 322(d)(4) of the special Forest Service statute provides that, "[i]f the Secretary [of Agriculture] fails to decide the appeal within the 45-day period [after the closing date for filing an administrative appeal], the decision on which the appeal is based shall be deemed to be a final agency action for the purpose of chapter 7 of title 5, United States Code." 108 Stat. 1420 (16 U.S.C. 1612 note). The statute thus confirms that final agency decisions regarding individual site-specific activities will be subject to judicial review under the APA.

Regulations implementing Section 322 were promulgated in 1993, see 58 Fed. Reg. 58,904, and are codified at 36 C.F.R. Part 215.

same age." Pet. App. 2a. One evenaged technique is clearcutting, which involves the removal of all trees within a given area at the same time. *Ibid.* Other evenaged techniques are seed-tree and shelterwood cutting, in which some trees in an area are left standing for a time to assist in the generation of new trees around them, and then are cut down to leave only younger trees of the same age. *Id.* at 15a.

The NFMA directs the Secretary to "insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where" specified criteria have been satisfied. 16 U.S.C. 1604(g)(3)(F). The Secretary is required, in particular, to ensure that evenaged management techniques "are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. 1604(g)(3)(F)(v). The Act further provides that clearcutting may be used as a method of evenaged harvesting only where "it is determined to be the optimum method * * * to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. 1604(g)(3)(F)(i).

3. a. This case involves a challenge to the LRMP developed for the Wayne National Forest in southern Ohio and approved by the Regional Forester in January 1988. In accordance with the NFMA and current planning regulations, the Wayne LRMP divided the forest into various management areas, identified forest lands not suitable for timber production, adopted standards and guidelines to guide subsequent decisions regarding timber harvesting and other use of natural resources, and established an overall ASQ for timber production from the Forest. The Wayne LRMP addressed the issue of aggregate timber

production by designating 126,107 (out of 176,787) federally owned acres in the forest as suitable for timber production, and by setting the ASQ at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. See Plan 4-7, 4-180; Record of Decision (ROD) 18, 19; Pet. App. 33a.[4] The plan "provide[d] for even-aged management on 80 percent of the suitable forest land and for uneven-aged management on the remaining 20 percent." ROD 18; see Plan 3-5 ("Approximately 21 percent of the suitable timber land will be managed under an uneven-aged silvicultural system," with "even-aged management on the remaining 79 percent of the suitable acres"); Pet. App. 16a.[5]

Although the LRMP designated 126,107 acres within the forest as suitable for timber production, it projected that only 7,835 acres would be harvested during the first decade of the plan. Plan 4-180. Of that acreage, it was projected that 5,075 acres would be harvested by evenaged methods and 2,760 acres by unevenaged methods. *Ibid.*; see Pet. App. 16a. The LRMP explained the rationale for timber management and harvesting techniques; the respective advantages of seed-tree, shelterwood, and clear-

[4] We have lodged a copy of the Land and Resource Management Plan for the Wayne National Forest, the Record of Decision, the Draft Environmental Impact Statement, and the Final Environmental Impact Statement with the Clerk of this Court.

[5] Appendix C to the LRMP explained the Forest Service's choice of vegetation management practices for each "management area" of the forest. For management areas 3.1, 3.2, 3.3, and 6.1, Appendix C projected the use of evenaged techniques as the primary method of timber harvesting. Plan App. C-6 to C-7; see also Plan 4-90 to 4-91, 4-98, 4-104, 4-118 to 4-119. Management area 3.1 contains 28,086 acres of land found to be suitable for timber harvesting; management area 3.2 contains 13,362 such acres; management area 3.3 contains 48,553 such acres; and management area 6.1 contains 9,641 such acres. See Plan 4-168, 4-170, 4-172, 4-174. Taken together, those management areas contain a total of 99,642 suitable acres—79% of the 126,107 acres identified by the Plan (see Plan 4-7) as suitable for timber harvesting.

cutting for particular areas and types of species; and the circumstances that would render clearcutting the optimal method to meet the overall objectives of the LRMP. See Plan App. C; Pet. App. 20a-26a.

The Regional Forester issued an ROD explaining the forest plan, as well as his reasons for selecting it from among seven alternatives. The ROD observed that "[t]he emphasis of the Forest Plan is not on site-specific decisions or specific outputs." ROD 38. It explained (*ibid.*):

> As a long-range strategy for the Forest, this Forest Plan and the accompanying FEIS [final environmental impact statement] are programmatic in nature. During implementation, when the various projects are designed, more site-specific analyses will be developed. These analyses may result in environmental assessments, environmental impact statements or categorical exclusions and, possibly, an amendment or revision of the Forest Plan.

b. Respondents Sierra Club and Citizens Council on Environmental Control (Citizens Council) each filed an administrative appeal from the Regional Forester's decision approving the plan.[6] In his decisions rejecting those administrative appeals, the Chief of the Forest Service emphasized that the plan did not incorporate binding decisions to undertake individual timber sales. Thus, in addressing the contention that the plan would permit timber harvesting on land that should have been designated as not suited for timber production (see 16 U.S.C. 1604(k)), the Chief stated:

> During implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales

[6] Pursuant to Forest Service regulations, the decision by a Regional Forester to approve an LRMP is subject to administrative appeal by members of the public. See 36 C.F.R. Pt. 217, 219.10(d).

> are evaluated on a sale-by-sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgements about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales. You have opportunities to be involved in these decisions and to appeal them if you disagree.

Pet. App. 70a; see also *id.* at 75a ("the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and * * * final decisions are yet to be made on many matters of evident concern to the appellants"); *id.* at 100a ("The Forest Plan makes no promise or assurance that the ouputs for any resource, including timber, will actually occur at the projected level.").

With respect to clearcutting in particular, the Chief observed that "[t]he optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the Forest to achieve specific management objectives." Pet. App. 98a. The Chief observed, however, that, under established Forest Service practice, "certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." *Id.* at 98a-99a. The Chief explained:

> The Forest Plan does not make the site-specific finding required by NFMA that clearcutting is the optimum method for harvesting. While clearcutting is allowed it is not mandated by the Forest Plan. The final decision on which harvest method will be used on a particular site will be based on a site-specific silvicultural prescription and interdisciplinary review. As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method.

Id. at 99a; see also *id.* at 76a, 103a.

4. Subsequent to their administrative appeals, respondents Sierra Club and Citizens Council filed suit challenging the Wayne Forest LRMP.[7] They contended that the plan (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. Thus, their second amended complaint alleged that the Wayne LRMP "places the objective of timber harvesting above all other uses"; "designat[es] economically and environmentally unsuitable lands for timbering"; "lacks site-specific determinations that clearcutting is the 'optimal' method of harvesting timber in the Wayne"; "fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole"; "fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness"; and "fails to demonstrate that the non-timber use benefits

---

[7] Respondents' initial complaint (Pet. App. 133a-145a) was filed March 18, 1992. Their second amended complaint (J.A. 12-27) was filed June 22, 1993. The second amended complaint invoked, *inter alia*, the NFMA and the NEPA, 42 U.S.C. 4332. J.A. 12-13. Neither of those statutes contains its own judicial review provision. As the district court recognized, judicial review therefore could be available only under the APA. Pet. App. 10a; see J.A. 13.

alleged to be achieved through the timber program are really needed." J.A. 19.[8]

With respect to standing, respondents alleged that their members visit the Wayne National Forest for recreational, avocational, occupational, and professional purposes, and that their members "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging." J.A. 13. They further alleged that the actions of the Forest Service would "allow[] damaging illegal and inefficient use of natural resources in national forest areas" and would "result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne." J.A. 14.

---

[8] In arguing that the Wayne LRMP overemphasized timber production generally, and clearcutting in particular, respondents did not contend that the projections contained in the plan exceeded some numerical or other substantive threshold imposed by federal environmental laws. Neither the NFMA nor the implementing regulations establish such a threshold. Rather, the gravamen of respondents' complaint was that various flaws in the Forest Service's decisionmaking *process* had led to the adoption of arbitrarily high timber harvesting projections. See, *e.g.*, J.A. 18 (alleging that, in identifying areas suitable for timber production, the Forest Service "ignored relevant economic information, selected harvest levels first, and then excluded from the suitable timber base only those lands not needed to meet the predetermined harvest levels"); J.A. 20 (alleging that, the Forest Service "arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne"); J.A. 21 (alleging that the Forest Service "failed to adequately consider or value the detrimental effects of the below-cost timber sales"); J.A. 22 (alleging that "[t]he plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plan['s] impact on water resources"); J.A. 23 (alleging that "[t]he FORPLAN program which the forest service used to develop the plan for the Wayne included numerous false and unjustified assumptions which arbitrarily biased the plan in favor of timbering"); *ibid.* (alleging that the Forest Service unlawfully failed to consider "a reasonable and broad set of alternatives" to the plan actually chosen).

The second amended complaint set forth statistics concerning the Forest Service's aggregate revenues and expenses for timber sales in the Wayne National Forest for the fiscal years 1987-1990. J.A. 18. Respondents did not, however, identify any specific timber sales that had occurred or would occur in the Wayne National Forest during the years covered by the plan. The requested relief included, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law." J.A. 24; see also J.A. 26. Petitioner Ohio Forestry Association intervened as a defendant in the district court.

The district court granted the government's motion for summary judgment. Pet. App. 10a-48a. Neither petitioner nor the government contended that the suit was nonjusticiable. The district court's only reference to the issue was its statement that, "[i]n those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. This determination will substantially affect future decisions and is ripe for review." *Id.* at 20a (citation omitted).

The district court addressed and rejected respondents' challenges to the general policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The court stated that respondents' concerns about the consequences of clearcutting "were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific

basis when the Forest Service proposes to pursue specific projects in the forest." *Id.* at 17a. The court observed as well that, "[w]hile the Plan narrows the scope of future environmental analyses, an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project." *Id.* at 25a.

The district court also held that the Forest Service had acted reasonably in designating the total acreage suitable for timber production and in setting the ASQ at 7.5 million board feet per year. The court noted in the latter regard that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan." Pet. App. 33a. The court observed in addition that, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur." *Id.* at 37a.

5. The court of appeals reversed. Pet. App. 1a-9a. The court first held that respondents' facial challenge to the forest plan was suitable for adjudication.[9] The court found

[9] Relying principally on the intervening decision in *Sierra Club* v. *Robertson*, 28 F.3d 753 (8th Cir. 1994), the government contended in the court of appeals that respondents' suit was nonjusticiable, both because respondents lacked standing to sue and because their claims were not ripe for adjudication. See Gov't C.A. Br. 17-25. The government did not argue that a forest plan is *never* subject to judicial challenge. The government's brief stated that "[i]f, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." *Id.* at 20. The government contended, however, that the Forest Service's promulgation of the LRMP for the Wayne National Forest did not give rise to actual or imminent injury to respondents, since the plan did not mandate that any particular timber harvesting activities would go forward, and since any proposed timber sale would be scrutinized individually prior to implementation to ensure compliance with applicable environmental laws. *Id.* at 21-23.

that respondents had standing to sue, asserting that LRMPs "represent significant and concrete decisions that play a critical role in future Forest Service actions." *Id.* at 4a. It held that, "[i]f [respondents were] allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the [NFMA] 'would forever escape review.'" *Ibid.* (quoting *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). The court of appeals also held that respondents' claims were ripe for review, concluding that respondents "need not wait to challenge a specific project when their grievance is with an overall plan." *Ibid.*

On the merits, the court concluded that the forest plan was arbitrary and capricious because "the planning process was improperly predisposed toward clearcutting." Pet. App. 5a. After quoting the text of the NFMA requiring that evenaged management be "consistent" with the protection of natural resources and regeneration of the timber resource (see 16 U.S.C. 1604(g)(3)(F)(v)), the court expressed the view that the NFMA "contemplates that even-aged management techniques will be used only in exceptional circumstances." Pet. App. 6a. It faulted the Wayne LRMP on the ground that the Forest Service "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." *Ibid.* The court asserted as well that "the Forest Service has a history of preferring timber production to other uses," and

that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.* at 7a. The court of appeals reversed the district court's order granting summary judgment for the government and remanded the case for further proceedings. *Id.* at 8a.[10]

6. While the petition for a writ of certiorari was pending in this Court, proceedings commenced in the district court on remand from the court of appeals' decision. Respondents filed a renewed motion for summary judgment and attached affidavits of three of their members addressed to the issue of standing. See Sierra Club/Citizens Council Br. in Opp. 10-11.[11] The affiants attested that they regularly utilize specific areas within the Wayne National Forest that were identified as suitable for timber harvesting under the 1988 LRMP. Two of the affidavits stated that ongoing timber projects, temporarily put on hold by the Forest Service, had been scheduled for areas of the forest utilized by the affiants. See Affidavit of Stephen J. Ostrander at 4; Declaration of Jason Tockman at 2-3. On September 5, 1997, the district court issued an order prohibiting the "timbering, thinning, and/or burning of trees" in the Bluegrass Ridge Restoration and Markin Fork timber projects pending further order of the court. *Sierra Club* v. *Dombeck*, No. C2-92-249 (S.D. Ohio). The proceedings in the district court have been held in abeyance since this Court granted the petition for a writ of certiorari.

[10] Judge Batchelder concurred separately. Pet. App. 9a. She agreed with the majority that the case presented a justiciable controversy, and she "agree[d] that the record before [the court] supports a conclusion that the Forest Service has not complied with the mandates of the [NFMA] relative to even-aged management practices in adopting the Plan." *Ibid.* While believing that there were "serious questions and concerns about the management practices and policies of the Forest Service," however, she stated that she "d[id] not believe that the majority's largely undocumented broadside against the Forest Service is appropriate." *Ibid.*

[11] Petitioner has lodged copies of the motion and attached affidavits with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. The plan provisions at issue in this case do not authorize or require the Forest Service to go forward with any timber harvesting project without a further, individualized consideration of its likely environmental effects. Although the agency's adoption of a forest plan can be expected to have a significant effect on the nature and extent of subsequent timber harvesting activities, the anticipated impact of the challenged plan provisions upon the overall management of the Wayne National Forest does not provide a sufficient basis for concluding that respondents' facial challenge presents a ripe controversy. Rather, under the current statutory and regulatory regime, respondents should be required to challenge individual timber harvesting activities threatening concrete injury to their members.

Channeling judicial review in that manner ensures that the challenged LRMP provisions are considered not in the abstract, but in their application to a particular on-the-ground decision. That mode of review also ensures that any relief the court may order is narrowly tailored to redress respondents' own injury. Requiring respondents to challenge individual site-specific activities also ensures that the resources of the Forest Service and the courts are not diverted to needless litigation concerning plan projections that ultimately fail to materialize. Finally, the absence of any substantial prejudice to respondents from deferral of their legal challenge reinforces the conclusion that the instant suit should not have been adjudicated.

2. The affidavits submitted by respondents to the district court on remand, even assuming that they are properly before this Court, do not render this suit justiciable. The affidavits suggest that respondents (or the

affiants themselves) could file suit to challenge individual timber sales, provided that they can satisfy finality and exhaustion requirements. Respondents could not, however, pursue the present broad-based attack on the Wayne LRMP simply by showing that they would be injured by individual on-the-ground activities.

3. If this Court holds that respondents' challenge to the Wayne LRMP is suitable for adjudication, the judgment of the court of appeals should be reversed on the merits. The NFMA requires that any use of evenaged management must satisfy certain prerequisites that do not apply to unevenaged methods, but it imposes no numerical limit on the use of evenaged techniques within a particular forest. The plan and associated documents adequately explained and supported the projections contained in the Wayne LRMP. The fact that those projections have to a significant degree failed to materialize does not mean that the projections were arbitrary when made; it simply shows that the Forest Service's overall decision-making process provides mechanisms for ensuring that changed circumstances are taken into account in applying programmatic guidance to individual project decisions over the life of the plan.

ARGUMENT

I. THE PROVISIONS OF THE LAND AND RESOURCE MANAGEMENT PLAN FOR THE WAYNE NATIONAL FOREST THAT ARE THE SUBJECT OF THIS LAWSUIT ARE NOT JUSTICIABLE IN THE CONTEXT OF A FACIAL CHALLENGE

Respondents have not contended that the LRMP at issue here requires the Forest Service to undertake or permit specific timber harvesting activities at identified locations in the Wayne National Forest. Their argument

instead is that the LRMP contains programmatic guidance that will influence the Forest Service's subsequent decisions concerning proposed timber harvesting projects over the life of the plan, and that at least some of those projects are, in turn, likely to cause injury to some of respondents' members. Although we believe that respondents have not shown that any of their members are sufficiently likely to experience injury as a result of timber harvesting activities in the future to satisfy Article III standing requirements, the Court in our view can most readily and appropriately resolve this case by holding that respondents' facial challenge to the relevant plan provisions is not ripe for review under the general judicial review provisions of the APA. If and when a specific timber sale threatening concrete harm to one of respondents' members actually becomes imminent, respondents can obtain administrative and (if necessary) judicial review of the proposed sale.

A. Principles Of Both Standing And Ripeness Serve To Ensure That Litigation Against The Government Is Not Brought Prematurely And That Disputed Legal Issues Are Considered In A Concrete Setting

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies." "All of the doctrines that cluster about Article III —not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-

1179 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)).

Article III's case-or-controversy requirement serves in part to ensure that disputed legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Even more fundamentally, however, "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750. By authorizing the federal courts to resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), the case-or-controversy requirement protects the separation of powers by ensuring that the Judicial Branch does not exercise a general superintendence over the workings of the federal government.[12]

The present case implicates two of "the doctrines that cluster about Article III," *Allen*, 468 U.S. at 750—the doctrines of standing and ripeness. To establish standing to sue, "a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."

[12] See also *Allen*, 468 U.S. at 760 (abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)); *Lewis* v. *Casey*, 116 S. Ct. 2174, 2179 (1996) (doctrine of standing embodies "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches").

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997) (internal quotation marks omitted).[13] This Court has noted, in particular, that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks omitted). Accord *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III requires allegation of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotation marks omitted).

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 114 (1976) (per curiam); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972)). The determination whether a dispute is ripe for adjudication involves an inquiry into "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); accord *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967). The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148-149.

[13] See also, *e.g.*, *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge*, 454 U.S. at 472; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Thus, principles of ripeness, and in part those of standing, serve to address the dangers inherent in *premature* involvement of the judiciary in the affairs of the political branches. Neither of those doctrines, however, establishes a rigid rule that litigation against the government must always be postponed until the last conceivable moment. Most significantly, Congress possesses substantial discretion to determine the proper form and timing of challenges to particular categories of agency action.[14] Even

[14] Thus, while "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA" until it has been applied to a particular claimant, "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Congress has included provisions in many environmental statutes, for example, that authorize judicial review by specific courts only within a prescribed period after agency action in order to ensure national uniformity, to secure prompt and final resolution of disputes concerning agency actions to protect the public health and welfare, and to protect the reliance interests of States and the regulated community. See, *e.g.*, 15 U.S.C. 2618 (Toxic Substances Control Act); 30 U.S.C. 1276(a) (Surface Mining Control and Reclamation Act of 1977); 42 U.S.C. 6976 (Resource Conservation and Recovery Act of 1976); 42 U.S.C. 7607(b) (Clean Air Act); 43 U.S.C. 1349(c)(3) (Outer Continental Shelf Lands Act); *Harrison* v. *PPG Indus.*, 446 U.S. 578, 592 (1980) (noting that the purpose of 42 U.S.C. 7607(b) is "to provide prompt pre-enforcement review of EPA action"); *National Mining Ass'n* v. *United States Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (noting that 30 U.S.C. 1276(a) reflects "Congress' careful effort to force potential litigants to bring challenges to a rule * * * at the outset unless they can meet the after-arising test"). A congressional judgment regarding the proper timing and circumstances of judicial review under federal agency programs is entitled to substantial respect. Compare *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before"). Our position that respondents here have not established standing therefore is not intended to call into question the availability of judicial review

where Congress has not addressed the issue directly, leaving the mode and timing of judicial review to be governed by the more general provisions of the APA, agency rules may appropriately be subject to facial challenge where prolonged uncertainty concerning the applicable law would subject the plaintiff to substantial hardship.[15] In determining when and in what form a suit may properly be brought, relevant factors may include: the statutory and regulatory regime; the degree to which actual injury to the plaintiff is likely to occur and the availability of administrative procedures to prevent or mitigate any such injury; the fitness of the legal issues for immediate judicial resolution; whether the agency concerned has made a formal determination that an opportunity for review will further program management by permitting early resolution of disputes concerning crucial issues; the degree to which the court's understanding of agency policy might be assisted by observing the application of that policy to a concrete factual setting; the possibility that deferral of the suit will obviate the need for litigation altogether; the likelihood that the parties will be prejudiced if adjudication of the suit is either undertaken prematurely or delayed unnecessarily; and the court's capacity to fashion appropriate relief if the plaintiff prevails. Applying those factors here, respondents' suit should be dismissed.

of regulations and comparable administrative measures under those special judicial review provisions.

[15] See *Abbott Laboratories*, 387 U.S. at 154 (plaintiffs had standing to assert facial challenge to regulation that "require[d] them to make significant changes in their everyday business practices" and established substantial penalties for noncompliance); *National Wildlife Fed'n*, 497 U.S. at 891 ("a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is ripe for judicial review).

B. Respondents' Suit Should Be Dismissed Because The Challenged Provisions Of The Wayne LRMP Are Not Ripe For Review

Respondents' second amended complaint alleged that the LRMP for the Wayne National Forest (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. See J.A. 19; pp. 9-10, *supra*. The challenged features of the Wayne LRMP provide programmatic guidance concerning the expected frequency and location of subsequent timber harvesting, as well as the methods of harvesting that are likely to be appropriate for particular areas of the forest. Before any particular timber sale actually goes forward, however, the Forest Service conducts an individualized assessment of its likely environmental consequences, an assessment that is subject to administrative and judicial review. Most significantly, the Forest Service is under no obligation to permit timber harvesting on a particular tract of the forest even if such harvesting would be consistent with the terms of the plan.

Because adoption of the plan provisions at issue here did not commit the Forest Service to undertake any particular timber harvesting project that might in turn harm one of respondents' members, we believe that respondents lack standing to bring a facial challenge to the plan provisions at issue here.[16] In order to establish that their members

[16] Our point, we emphasize, is not simply that the Wayne LRMP fails to list the timber sales that will occur during the life of the plan. Different issues would be raised, for example, if an LRMP *required* that timber harvesting must occur on any tract within the forest that was subsequently determined to satisfy specified criteria. Even if such a plan did not identify the specific sales that would go forward, a plaintiff might be able to show that he used tracts that demonstrably

would suffer injury in fact as a result of timber sales, respondents would be required to show that they utilize areas of the forest that would be affected by the harvesting activities. See *Defenders of Wildlife*, 504 U.S. at 565-566 ("a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it"); *id.* at 594 (Blackmun, J., dissenting); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 887, 889 (1990); see also *id.* at 902-904 (Blackmun, J., dissenting).[17] At the time the Wayne LRMP was adopted, however, it was unclear where, how often, and in what manner the Forest Service would permit timber harvesting projects within the Wayne National Forest. As a result of that discretion retained by the Forest Service under the existing regulations and Wayne LRMP, it was unclear when the plan was adopted whether any timber harvesting activities ultimately carmet the stated conditions. Under those circumstances, the agency's adoption of the LRMP might be said to render the plaintiff's injury sufficiently likely that Article III standing requirements would be satisfied, even if the agency had not yet issued a formal determination regarding the propriety of harvesting at particular locations. Under the existing statutory and regulatory framework, however, the agency retains discretion not to go forward with a proposed timber sale even if the sale is determined to be consistent with the plan.

[17] The areas "affected by" a particular timber harvesting project most obviously include, but are not limited to, the tracts of land on which harvesting actually occurs. Thus, if timber harvesting near a river could be shown to cause increased sedimentation and consequent damage to water quality, a downstream user of the river could establish injury on that basis. Similarly, a plaintiff who challenges a proposed site-specific action on the ground that it would harm a particular animal species may be able to establish injury by demonstrating impairment of his own observation of or work with animals of that species at other locations, even if he does not visit the tract in question. See *Defenders of Wildlife*, 504 U.S. at 566-567. As a rule, however, a plaintiff could not show what tracts will be affected by timber harvesting activities without identifying the tracts on which harvesting will actually take place.

ried out would affect an area of the forest utilized by one of respondents' members. Accordingly, under the present statutory and regulatory framework, mere adoption of the Wayne LRMP provisions challenged here did not, in itself, sufficiently threaten to cause injury to respondents' members to satisfy Article III standing requirements.[18]

---

[18] *Bennett* v. *Spear* is not to the contrary. In *Bennett*, this Court held that plaintiffs who received water from the Bureau of Reclamation had standing to challenge a biological opinion issued by the Fish and Wildlife Service, even though final decisions regarding the allocation of water would be made by the Bureau. See 117 S. Ct. at 1163-1165. The Court explained that, while the Bureau was "technically free to disregard the Biological Opinion and proceed with its proposed action, * * * it [would do] so at its own peril (and that of its employees)," since any "taking" of an endangered species done in a manner inconsistent with the biological opinion would subject agency personnel to substantial civil and criminal penalties. *Id.* at 1165. Because of "the virtually determinative effect of [the Fish and Wildlife Service's] biological opinions," the Court concluded, the plaintiffs' threatened injury (in the form of reduced water availability) was "fairly traceable" to the biological opinion itself. *Ibid.*; see also *id.* at 1164 ("while the Service's Biological Opinion theoretically serves an advisory function, in reality it has a powerful coercive effect on the [Bureau]") (citation and internal quotation marks omitted).

The LRMP provisions at issue here, by contrast, cannot be said to have a "coercive"—much less a "virtually determinative"—effect on the Forest Service's decisions whether to allow timber harvesting at particular locations. To the contrary, the agency may (for a variety of reasons) decline to undertake harvesting activities at a particular location even though they would be fully consistent with the terms of the plan. Indeed, the Chief of the Forest Service took considerable pains, in affirming the Regional Forester's approval of the Wayne LRMP, to emphasize that the plan did not commit the agency to harvest timber in any particular quantity or at any particular location. See pp. 8-9, *supra*. Thus, we do not contend that respondents lack standing simply because the LRMP is not "the very last step in the chain of causation." *Bennett*, 117 S. Ct. at 1164. Our point instead is that the substantial discretion retained by the Forest Service even after the plan's adoption precludes a finding that respondents face "certainly impending" injury, *Whitmore*, 495 U.S. at 158, and that any such injury they may suffer in the future is, at this stage, "fairly traceable" to the LRMP itself.

For several reasons, however, we believe that it would be more appropriate to decide this case on prudential ripeness grounds rather than on Article III standing grounds. First, ripeness doctrine focuses more precisely on questions of *timing*—and, in particular, on questions concerning the propriety of reviewing general agency policies before those policies have been applied to discrete factual settings. Second, this case does not arise under a special statutory review provision in which Congress dispensed with prudential limitations on the exercise of jurisdiction, thereby making it necessary for the Court to define the outer limits of Article III. Compare *Raines* v. *Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997); *Bennett*, 117 S. Ct. at 1162-1163. It arises under the APA, which incorporates prudential ripeness limitations on the power of a reviewing court to grant equitable relief in the form of an injunction or declaratory judgment. See *Catholic Social Services*, 509 U.S. at 57-58; *Abbott Laboratories*, 387 U.S. at 148, 155. The propriety of respondents' facial challenge is therefore most appropriately determined by reference to those limitations under the APA—the Act by which Congress has provided for judicial review of the Forest Service's on-the-ground activities.

Third, and in a related vein, a decision based on prudential ripeness grounds would be consistent with the "fundamental and longstanding principle of judicial restraint [that] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (citing, *inter alia*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring)). The Court may thereby afford Congress or the Forest Service the opportunity to consider in the first instance whether (and, if so, under what circumstances) certain forest plan provisions should be subject to facial chal-

lenge.[19] That approach would also avoid a holding that might be construed as raising constitutional questions concerning existing statutory provisions that authorize judicial review of regulations or other agency policy judgments prior to their application to a concrete factual setting. See note 14, *supra*.

Finally, the manner in which this case has been litigated would complicate the Court's efforts to resolve the issue of standing. As we noted in our brief in opposition (at 9, 19), neither petitioner nor the government contended in the district court that respondents' claims were not justiciable. See p. 11, *supra*. As a result, respondents were not called upon to submit (and the courts below had no opportunity to consider) evidence clarifying or substantiating their claims of injury to their members. Compare *Bennett*, 117 S. Ct. at 1163-1164; *Defenders of Wildlife*, 504 U.S. at 561.[20] The Court's resolution of the ripeness

---

[19] While noting that ripeness doctrine reflects both constitutional and prudential concerns, see, *e.g.*, *Catholic Social Services*, 509 U.S. at 57 n.18, this Court has not attempted to define the precise line of demarcation between the two. We believe that the instant case is most appropriately resolved on prudential ripeness grounds. Because Congress has neither explicitly nor implicitly authorized the assertion of facial challenges to LRMPs, the Court need not determine whether, and under what circumstances, a statutory authorization for facial challenges to various types of provisions in an LRMP would be consistent with Article III. We note, however, that S. 1253, introduced in the Senate on October 3, 1997 (see 143 Cong. Rec. S10,323), would provide, *inter alia*, for judicial review of forest plans, plan amendments, or plan revisions. Section 117 of the bill would expand standing to the full extent permitted by the Constitution and would require that suit be brought within 90 days after the final decision on the administrative appeal of an LRMP, plan amendment, or plan revision. See *id.* at S10,327-S10,328.

[20] Even in the court of appeals, the government stated that it was *not* "claiming that [respondents] ha[ve] failed to show injury by failing to establish use of the geographic area, or that it is too uncertain that [respondents'] members will return to the site." Gov't C.A. Br. 22-23 (footnotes omitted). It is our position here, however, that, if a facial challenge were to proceed, respondents would be required to make allegations (and, on summary judgment, a showing) of their use of particular tracts that they assert would be affected.

question is much less apt to be hindered by any gaps in the evidentiary record. The Court need not assess the likelihood that respondents will ultimately suffer injury as a result of timber harvesting activities in the Wayne National Forest. It need only determine that any such injury, if and when it becomes imminent, can more appropriately be redressed through a challenge to individual timber projects than through a facial attack on the plan itself.

1. The Provisions Of The Wayne LRMP Challenged By Respondents Do Not Authorize Or Require The Forest Service To Undertake Any Site-Specific Activity Without Further Consideration Of Its Environmental Effects

Up to this point, the Forest Service's usual practice has been not to include final decisions regarding individual timber harvesting projects as part of an LRMP. Nothing in the NFMA, however, would foreclose the agency from incorporating such decisions within a forest plan. The Forest Service is currently undertaking a review of the regulatory provisions governing the formulation of LRMPs in order to determine how plans can be used most effectively within the forest management process. See Gov't Br. in Opp. 22-23. To the extent that a particular LRMP incorporates final decisions that are otherwise suitable for immediate judicial review, review is not precluded simply because those decisions are contained within a "plan." See *ibid.*; note 9, *supra*. We therefore do not contend that the instant case should be resolved on the basis of a per se rule that LRMPs are unreviewable. Our position instead is that the plan provisions that are the

subject of respondents' suit are not subject to judicial review in the context of a facial challenge, since they neither require nor authorize the Forest Service to undertake any timber harvesting projects without a further, individualized assessment of likely environmental effects and other considerations.

a. The Forest Service is required, in developing an LRMP for a unit of the national forest system, to identify lands within the forest that are "not suited for timber production." 16 U.S.C. 1604(k).[21] A determination that particular tracts are "suited for timber production," however, does not mean that timber harvesting must actually occur on those tracts, either in the immediate future or during the life of the plan. Economic or other factors, for example, might cause timber to remain uncut. And any proposed timber sale must be preceded by an individualized consideration of its likely environmental consequences before it is carried out, which would furnish an opportunity for the agency to consider and address any objections respondents or their members might have, and perhaps mitigate or eliminate particular environmental harms.

In rejecting the administrative appeals in this case, the Chief of the Forest Service emphasized that the propriety of individual sales would be subject to site-specific inquiries—including consideration of a no-action alternative—in which the public would be given an opportunity to participate. See pp. 7-9, *supra*. Indeed, although the Wayne LRMP designated 126,107 acres within the forest as suited for timber production, it projected that only 7,835 acres would be harvested during the period from

[21] Section 1604(k) provides that, "[i]n developing [LRMPs] pursuant to [the NFMA], the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible." The applicable regulation, 36 C.F.R. 219.14, sets forth the criteria to be considered by the Forest Service in identifying unsuitable lands.

1986 to 1996. Plan 4-180. Thus, both the Plan itself and the Chief's decisions rejecting the administrative appeals refute any suggestion that designation of particular tracts as "suited for timber production" commits the Forest Service to the harvesting of timber in those areas. See also Pet. App. 36a, 37a (district court observes that "[t]he amount of suitable timber base does not represent the amount of timber which will be harvested," and that, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur").[22]

b. Much the same analysis applies to the ASQ established by the LRMP. The ASQ functions solely as a *maximum* and does not commit the Forest Service to allow the harvesting of any particular quantity of timber. See 53 Fed. Reg. 26,832 (1988) (explaining that the ASQ "is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold"). In rejecting the administrative appeal filed by Citizens Council in this case, the Chief of the Forest

[22] The district court observed that the Wayne LRMP "contemplates that the effects of timber harvesting will be controlled by the design of timber sale areas using standards and guidelines that will adequately protect these resources," and that "a separate environmental analysis will be conducted at the time of any proposed timber sale." Pet. App. 28a, 29a. The court also observed that "[t]he cost of mitigation measures is site-specific. The cost of mitigation measures is borne by the purchaser. If the cost of required mitigation measures at any specific site renders the timber sale unprofitable, then it is safe to assume that it will not occur." *Id.* at 29a (citation omitted). The court thus recognized that, even where a particular tract is designated as suited for timber production, both the Forest Service and the prospective purchaser(s) will consider a variety of site-specific environmental and economic factors before any timber harvesting activities will actually occur.

Service emphasized that the "ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level." Pet. App. 100a. See also *id.* at 33a (district court observes: "The ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors.").

c. The plan's projections regarding likely methods of timber harvesting are similarly contingent in nature. The LRMP at issue in this case does not require that clearcutting must occur at all, much less that it must occur at a particular location. As the Chief observed, established Forest Service practice is that "certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." Pet. App. 98a-99a. "As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method." *Id.* at 99a. Thus, while the projections in the LRMP furnish "programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest," they do not commit the Forest Service to utilize clearcutting with any particular frequency or at any particular site. *Id.* at 98a; see also *id.* at 76a.[23]

[23] The Forest Service's management of the Wayne National Forest since the LRMP was adopted confirms that activities *permitted* by a forest plan will not necessarily go forward. As noted above, the ASQ under the LRMP at issue here is 75 million board feet during the first decade of the plan. Forest Service statistics indicate, however, that a total of only 29.8 million board feet of timber was sold in the Wayne National Forest during the years 1988-1996. See Forest Plan Estimates v. Actual Accomplishments (lodged with the Clerk of this Court). Only 2.0 million board feet of timber were sold in the forest during the four-year period from 1993 through 1996. *Ibid.* Although the plan projected that 5,075 acres would be harvested by evenaged management techniques during the first decade, only 1,540 acres were actually so harvested. See Summary of Harvest on Wayne NF from STARS Database (lodged with the Clerk of this Court) (1,434 acres harvested by clearcutting, 106 by shelterwood cutting); see also Pet. 20 n.10; pp. 39-41 & n.30, *infra*.

2. Respondents Cannot Establish The Existence Of A Ripe Controversy Simply By Demonstrating That The Challenged Plan Provisions Will Influence The General Course Of The Agency's Superintendence Of The Wayne National Forest

Respondents have not directly contested the foregoing analysis—*i.e.*, they have not contended that the Wayne LRMP required the Forest Service to undertake any *particular* timber sale or other ground-disturbing activity. Their argument instead is that the plan will substantially influence the overall management of the Wayne National Forest, even if it does not compel any individual project to go forward. We do not dispute the validity of that premise. Because the purpose of an LRMP is to "guide all natural resource management activities" within the affected unit of the national forest system, 36 C.F.R. 219.1(b), the agency's formulation of a forest plan, and its decision to adopt one plan from among competing alternatives, can be expected to affect the nature and extent of the site-specific activities that the Forest Service ultimately selects. Indeed, the commitment of time and resources that the Forest Service devotes to the formulation of LRMPs would be pointless if the terms of the plan were not expected to have a substantial influence on subsequent

decisions addressing particular on-the-ground activities. We do not agree, however, that the respondents have alleged or could allege that the anticipated impact of the challenged plan provisions upon the overall management of the Wayne National Forest provides a sufficient basis for concluding that those provisions are subject to a facial challenge. Rather, under the current statutory and regulatory framework, respondents should be required to challenge individual timber harvesting activities threatening concrete injury to their members, if and when such activities become imminent. Compare *National Wildlife Fed'n*, 497 U.S. at 892-893 & n.3.[24]

Such a regime will not insulate from judicial scrutiny any determinations in the plan that become relevant to any ground-disturbing activities that may later threaten injury to respondents' members. A court's review of individual timber harvesting projects within the Wayne National Forest to determine if they are arbitrary and capricious under the APA will include consideration and evaluation of any programmatic guidance contained in the LRMP that bears on the propriety of an individual project decision. See *Sierra Club* v. *Robertson*, 28 F.3d 753, 759 (8th Cir. 1994) (a plaintiff who will be injured by a proposed site-specific activity "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both"); *Wilderness Society* v. *Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (noting government's concession that the plaintiff in a suit concerning a site-specific activity "can challenge both the site-specific action as well as the Plan-level decision(s) underlying the specific action"). For a variety of reasons, that mode of review is more consistent with the governing statutory and regulatory framework and general principles of justiciability than is adjudication of respondents' facial challenge to the LRMP itself.

[24] Respondents' second amended complaint was filed June 22, 1993, see J.A. 12—nearly five and one half years after the Forest Service adopted the Wayne LRMP. Thus, the agency had undertaken a substantial range of site-specific activities (including timber harvesting) pursuant to the plan *before* the second amended complaint was filed. That fact renders all the more significant respondents' failure to file suit to challenge *any* specific timber harvesting activities causing or threatening injury to their members.

a. This Court has held that

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

National Wildlife Fed'n, 497 U.S. at 891. An LRMP, like a regulation, is a "final agency action" that typically represents the culmination of a lengthy decisionmaking process within the government and can be expected to influence the agency's conduct in the future. As with a forest plan, moreover, the process by which agency regulations are formulated typically involves substantial public participation. Compare 16 U.S.C. 1604(d) (Forest Service is required to "provide for public participation in the development, review, and revision of [LRMPs]") with 5 U.S.C. 553 (notice and comment rulemaking).[25] This

[25] As the district court observed, "the development of an [LRMP] proceeds through a series of steps which ensure public involvement at each stage of the planning process." Pet. App. 12a. In developing the Wayne LRMP and selecting the plan actually adopted from among seven alternatives, the Forest Service received and analyzed over 1,500 written comments from members of the public. *Id.* at 13a.

Contrary to the court of appeals' suggestion (see Pet. App. 4a), our position that respondents' facial challenge is nonjusticiable is in no

Court's decision in *National Wildlife Federation* is best understood as recognizing a background presumption that a general agency policy is not ordinarily ripe for judicial review until it is applied to a concrete factual setting.

That presumption can, however, be overcome, in situations in which the promulgation of a rule or other final agency action of general applicability "will itself affect parties concretely enough to satisfy [the ripeness] requirement, as it did in *Abbott Laboratories* itself," where "the promulgation of the challenged regulations presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Catholic Social Services*, 509 U.S. at 57; see *id.* at 57-59; *National Wildlife Fed'n*, 497 U.S at 891-892. So, too, we believe that, in appropriate circumstances, the agency concerned may properly determine under applicable procedures that a regulation or other final agency action of comparable import is sufficiently definitive in its impact on private parties to permit immediate judicial review of the provision without exhausting administrative remedies available with respect to a particularized application of the provision. Compare *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975). In this case, however, respondents have not alleged that the plan provisions they challenge in themselves cause the sort of hardship to respondents' members that this Court's cases have required, and, under its current regulations, the Forest Service has not made the sort of

---

way inconsistent with the NFMA's mandate of broad public participation in the formulation of LRMPs. Because the protection of the *public* interest is entrusted to the political branches, see *Defenders of Wildlife*, 504 U.S. at 576, it is appropriate that the Forest Service solicit and consider the views of all persons who are concerned about the manner in which the Wayne National Forest is managed. Persons who invoke the jurisdiction of a federal *court*, by contrast, must establish a more tangible and immediate interest in the outcome of a dispute.

determination discussed above concerning the propriety of dispensing with exhaustion of the administrative procedures that are available for site-specific activities.

b. The Forest Service is required by statute to provide opportunities for public notice and comment, along with a right of appeal, for "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans." Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note). The statutory scheme makes clear that the agency's final decision to undertake a timber sale is subject to a separate opportunity for administrative review, and to judicial review under the APA. See note 3, *supra*. Congress has also required that "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction" against Department of Agriculture defendants. Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 212(e), 108 Stat. 3211. Thus, respondents would be required by statute to exhaust available administrative remedies before filing suit to challenge any proposed timber sale within the Wayne National Forest. That requirement would be subverted if respondents were permitted to file a facial challenge to the plan itself. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 621-622 (1984) (plaintiff cannot circumvent exhaustion requirement applicable to claims for Medicare reimbursement by filing a declaratory judgment action to challenge agency rules governing reimbursable expenses).

The availability of an administrative appeal procedure, together with the requirement that administrative remedies be exhausted as a prerequisite to judicial review, ensures that members of the public who may be affected

by proposed timber harvesting activities can bring any objections to the attention of the Forest Service before the agency renders a final decision. The administrative appeal process can be expected to obviate the need for judicial review in some cases (when the administrative appeal results in a decision not to go forward with the contemplated action),[26] and to ensure that any judicial review that does take place is based upon a well-developed administrative record. See *Weinberger* v. *Salfi*, 422 U.S. at 765 (administrative exhaustion requirements serve to "prevent[] premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review").

Thus, while a court in reviewing individual timber harvesting activities may assess the rationality of any pertinent programmatic guidance (see pp. 32-33, *supra*), the record before the court in such a suit will never be limited to the LRMP itself. A reviewing court will consider as well the manner in which that guidance has been applied to a particular project, including the agency's analysis of relevant site-specific factors. Even where forest plan provisions ultimately become the subject of judicial scrutiny, the court's review is therefore likely

[26] Since the approval of the Wayne LRMP, respondents have twice pursued successful administrative appeals challenging proposed site-specific timber harvesting activities in the Wayne National Forest. In decisions issued November 20, 1992, the Forest Supervisor concluded on each appeal that the relevant decision documents did not adequately justify the conclusion that clearcutting was the optimal method of harvest for the site in question. See Appeal Nos. 92-09-11-0008, 92-09-11-0009 (lodged with the Clerk of this Court). Thus, respondents' own experience confirms that proposed timber sales, even if consistent with the plan, will be subject to meaningful site-specific analysis before they are allowed to go forward.

to be more focused and better informed if the plan is considered in its application to a particular project, rather than in the abstract setting of a facial challenge. Compare, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164 ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here").[27]

[27] To the extent that the nature and effect of a particular plan provision are unclear—*i.e.*, insofar as it is uncertain whether or to what extent the plan provision will "drive" subsequent site-specific activities—that uncertainty is itself a reason to postpone judicial review. Once the Forest Service announces and explains a particular site-specific decision, a court can more confidently determine whether (and if so, in what way) the agency regards the plan provision as having some binding effect in individual decisions concerning particular timber harvesting projects, and to what extent the plan provision will be determinative with respect to whether and in what manner the proposed project will be carried out. Because the agency's construction of its own forest plan would be entitled to deference, cf., *e.g.*, *Martin* v. *OSHRC*, 499 U.S. 144, 150 (1991) ("It is well established that an agency's construction of its own regulations is entitled to substantial deference.") (internal quotation marks omitted), it is particularly appropriate that judicial review should take place in a context in which the plan has been construed and applied to a concrete on-the-ground decision.

The District of Columbia Circuit confronted an analogous problem in *American Trucking Ass'ns* v. *ICC*, 747 F.2d 787 (1984) (Scalia, J.). The court concluded that petitioners' challenge to an Interstate Commerce Commission policy statement was not ripe for review. The court explained that ripeness doctrine serves, *inter alia*, to safeguard the interests of the judiciary by (1) "protecting [the court] from adjudicating matters that are not sufficiently 'fleshed out' that [it] may see the concrete effects and implications of" its decision, and (2) "protecting [the court] from adjudicating matters that in fact make no difference and are a waste of [its] resources." *Id.* at 789-790. The court observed that "[a]t most the policy statement means that *future* actions of the Commission * * * may be damaging to the petitioners—but that prospect in no way affects any action they must take or should take at the present time." *Id.* at 790. It also noted that the policy statement was to some degree ambiguous, and that its precise role in the

c. A regime under which judicial review is focused upon specific timber harvesting decisions also serves to ensure that any relief the court may order can be narrowly tailored to redress the plaintiff's own injury. See *Lewis* v. *Casey*, 116 S. Ct. 2174, 2183 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."); see also *id.* at 2183-2184 & n.6.[28] By contrast, if a plan-level challenge is permitted to go forward based upon the prediction that some *unidentified* site-specific action that may be taken under the Wayne LRMP in the future might eventually injure one of respondents' members, the precise nature of that injury, and thus the proper scope of any relief, will be unknowable. Any remedial order entered in such a

agency's decisionmaking process would be clarified if judicial review were focused on a concrete application of the policy to a particular decision. *Ibid.* All of those concerns are applicable here.

[28] The practical consequences of a judicial order may, we acknowledge, extend beyond the particular on-the-ground action that is the subject of the court's review. Thus, if the court enjoins a particular timber sale because programmatic guidance contained in the LRMP and adhered to in the site-specific decision is arbitrary or contrary to law, that ruling may have preclusive effects in subsequent litigation between the parties involving other timber sales. A comparable appellate court ruling may have a stare decisis effect that will, as a practical matter, be dispositive of future suits involving different plaintiffs in which the validity of the programmatic guidance is called into question. Compare *National Wildlife Fed'n*, 497 U.S. at 894 (judicial review of individual agency actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). And quite apart from any legally binding consequences that a judicial decree may have, the Forest Service may seek of its own accord to eliminate a purported programmatic flaw, either by amending the plan or by tailoring subsequent site-specific activities to meet the court's concerns. It nevertheless remains the case that the court's remedial decree—and, in particular, the scope of any injunctive relief—should extend no further than is necessary to redress the injury to the plaintiff resulting from the challenged site-specific activity.

suit could have no more than a fortuitous relationship to the injury that respondents would actually have suffered over the life of the plan.[29]

Thus, in contending that respondents' facial challenge to the Wayne LRMP is not ripe for adjudication, our point is not that respondents should have brought essentially the same lawsuit at a later point in time. If respondents sought to challenge an individual timber harvesting activity, they would be required to exhaust administrative remedies with regard to that decision; the court's review would be limited to those plan provisions bearing on the propriety of the contested decision; and the relief (if the suit was successful) would be confined to setting aside the decision and preventing respondents from suffering actual or imminent harm. Respondents should not be permitted to evade those limitations by filing suit before any concrete injury has materialized.

d. In rejecting respondents' administrative appeals, the Chief of the Forest Service took pains to emphasize that the LRMP did not incorporate binding decisions to undertake individual timber sales; that respondents (and other private parties) would have opportunities to participate in the agency's decisionmaking processes regarding individual sales; and that actual outputs might therefore diverge from the projections in the plan. See pp. 7-9, *supra*.

[29] A particularly troubling aspect of respondents' second amended complaint is its request for relief, which seeks, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised." J.A. 24. It is wasteful, to begin with, to be forced to litigate the reasonableness of LRMP projections that have manifestly failed to materialize. See note 23, *supra*; pp. 39-41, *infra*. But any illegality or capriciousness in those projections, even if proved, surely could not justify a prohibition on *all* timber harvesting in the forest. The inappropriateness of such relief is made all the more vivid in this case by the fact that respondents have not filed suit to challenge any individual timber sale that has occurred in the Wayne National Forest during the last decade.

Shortly after the initial complaint in this case was filed, the Chief issued policy guidance that was intended "to reduce clearcutting on National Forest System lands." See Memorandum from F. Dale Robertson to Regional Foresters and Station Directors, Re: Ecosystem Management of the National Forests and Grasslands, Attach. 2 (June 4, 1992). That policy guidance limited clearcutting to specified circumstances, and the Chief forecast that "[t]his clearcutting policy combined with the new USDA-Forest Service ecosystem management can reduce clearcutting by as much as 70 percent from FY 1988 levels." *Ibid.* (We have lodged a copy of that policy guidance with the Clerk of this Court.) As a result of respondents' plan-level challenge, however, the Forest Service was called upon to defend in the courts below projections that had been substantially superseded by the new policy adopted at the national level.[30]

By awaiting final agency decisions concerning proposed timber sales, the courts can prevent the expenditure of time and resources on needless litigation concerning projected activities that may ultimately fail to materialize. In this case, respondents challenged, and the court below reviewed, tentative determinations and projections concerning timber harvesting generally, and clearcutting in particular, that had currency at the time the plan was adopted, but that do not reflect the agency's current management practices in the Wayne National Forest. See also note 23, *supra* (noting divergence between Wayne LRMP projections and actual outputs). The Forest Service and the courts should not be forced to divert their scarce resources from addressing current matters having concrete effect in order to litigate such abstract questions of past history.

[30] Intervening statutory changes also altered the range of options lawfully available to the agency. Since 1991, each congressional appropriation for the Forest Service has provided that no appropriated funds "shall be used for timber sale preparation using clearcutting in hardwood stands in excess of 25 percent of the fiscal year 1989 harvested volume in the Wayne National Forest, Ohio." See Pub. L. No. 101-512, Tit. II, 104 Stat. 1942; Pub. L. No. 102-154, Tit. II, 105 Stat. 1018; Pub. L. No. 102-381, Tit. II, 106 Stat. 1401; Pub. L. No. 103-138, Tit. II, 107 Stat. 1403; Pub. L. No. 103-332, Tit. II, 108 Stat. 2524; Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-185; Pub. L. No. 104-208, Div. A, Tit. II, 110 Stat. 3009-208; Pub. L. No. 105-83, Tit. II, 111 Stat. 1576-1577.

e. "[T]he test of ripeness * * * depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the [challenged action's] present effect on those seeking relief." *Toilet Goods Ass'n*, 387 U.S. at 164. Respondents would suffer no significant hardship by deferral of their legal challenge until the point at which the contested provisions threaten imminent on-the-ground consequences. The LRMP provisions challenged here do not, for example, "require[] an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Abbott Laboratories*, 387 U.S. at 153; see also *Catholic Social Services*, 509 U.S. at 57-59. The absence of any substantial prejudice to the respondents reinforces the conclusion that their plan-level challenge ought not to have been adjudicated.

3. The Affidavits Submitted By Respondents In The District Court On Remand Do Not Render Respondents' Plan-Level Challenge Suitable For Adjudication

The court of appeals in this case reversed the order of the district court granting summary judgment for the government and remanded the case for further proceedings. While the petition for a writ of certiorari was pending in this Court, respondents filed a renewed motion for summary judgment in the district court and attached affidavits of three of their members addressed to the issue of standing. Two of the affidavits stated that ongoing timber projects, temporarily put on hold, had been

scheduled for specific areas of the forest utilized by the affiants. See p. 14, *supra*; Sierra Club/Citizens Council Br. in Opp. 10-11. Respondents contend (see *id.* at 10-14) that those developments render their plan-level challenge suitable for adjudication whether or not it was previously justiciable. That claim is without merit.

Even assuming, *arguendo*, that respondents' affidavits are properly before this Court, nothing in those affidavits affects the justiciability of their plan-level challenge.[31] If the Forest Service has reached a final decision regarding the sales in question, the sales themselves would be ripe for judicial review. A plaintiff who has adequately alleged injury in fact resulting from the sales, and who has satisfied applicable exhaustion requirements (see p. 35, *supra*),[32] would be entitled to seek judicial review of those

[31] We are perplexed by respondents' suggestion (see Sierra Club/Citizens Council Br. in Opp. 11-12, 14) that the existence of timber harvesting under the Wayne LRMP represents a change in circumstances that has occurred since the case was submitted to the court of appeals. Timber has been harvested in the Wayne National Forest throughout the life of the plan, though at a volume substantially less than initially projected. Perhaps respondents mean that the sales identified in their brief in opposition are the first sales under the plan to threaten concrete injury to their members. That would be consistent with the affidavits themselves, which indicate that the affiants are generally satisfied with the current condition of the Wayne National Forest. See Affidavit of David A. Scott at 2 ("Sierra Club outings leaders favor national forest property like the Wayne for several reasons: the aesthetic pleasure of hiking or camping in a large swath of old, unspoiled forest; the educational value of visiting an area with a variety of trees; and the recreational possibilities afforded by the lack of restrictions on our use of national forest lands"); Affidavit of Stephen J. Ostrander at 3 ("I have traveled extensively in Ohio's natural world, and can safely say that few places in this state can match the [Wayne National Forest's] abundance for solitude, isolation and room for roughing it").

[32] The affidavits submitted to the district court on remand do not suggest that either the respondent organizations or the individual affiants have exhausted their administrative remedies with respect to the sales in question.

site-specific actions. The reviewing court could consider any aspects of the plan that bear on the propriety of the individual sales. A plaintiff could not, however, bring the entire plan before the court simply by identifying a single site-specific action that had caused him injury. See *Lewis*, 116 S. Ct. at 2183.[33]

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LRMP AT ISSUE IN THIS CASE WAS INCONSISTENT WITH LEGAL REQUIREMENTS

The court of appeals held that the LRMP for the Wayne National Forest was arbitrary and capricious because it "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. In the view of the court of appeals, the Wayne LRMP's projections concerning the anticipated use of evenaged management violated a purported NFMA requirement that "even-aged management techniques will be used only in exceptional circumstances." *Ibid.* In support of that proposition, the court relied (see *ibid.*) on 16 U.S.C. 1604(g)(3)(F)(v), which states that evenaged management techniques must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, rec-

[33] Respondents contend that both the Eighth and Eleventh Circuits "have made it clear that once ground-level projects are begun pursuant to a forest plan, there is no question that challenges to a forest plan by individuals or groups affected by the ongoing projects are justiciable." Sierra Club/Citizens Council Br. in Opp. 13. That is incorrect, or at least overbroad. Both those courts of appeals have recognized that judicial review of a site-specific action may include scrutiny of any programmatic guidance that bears on the Forest Service's decision to undertake that particular project. See *Robertson*, 28 F.3d at 759; *Alcock*, 83 F.3d at 390; pp. 32-33, *supra*. But neither court suggested that the plan may be reviewed and set aside in its entirety simply because the plaintiff has established injury in fact resulting from a single site-specific action.

reation, and esthetic resources, and the regeneration of the timber resource."

The Sixth Circuit did not explain its determinations that evenaged management techniques may be employed "only in exceptional circumstances," and that the Forest Service had improperly "utilize[d] even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court of appeals' disapproval of the Wayne LRMP may have been based on the fact that the plan "provide[d] for even-aged management on 80% of the suitable forest land." ROD 18; see Pet. App. 2a ("The plan designated that eighty percent of all timbering techniques would be 'even-aged management'"); p. 6 & n. 5, *supra*. The court's opinion could thus be read to hold that a forest plan which identifies evenaged management as the anticipated primary method of timber harvesting is *ipso facto* violative of the NFMA. Alternatively, the court's reference to "exceptional circumstances" could be construed as essentially a restatement of the statutory requirement that use of evenaged management must be premised on specific findings that are not required for unevenaged techniques. See 16 U.S.C. 1604(g)(3)(F). In asserting that the Wayne LRMP employed evenaged management "as if it were the statutory rule," the court of appeals might simply have meant that the agency had failed adequately to support its projection that a substantial majority of the suitable acreage could appropriately be harvested through the use of evenaged methods. Under either reading of the opinion, the court of appeals' decision was in error.

A. Nothing In The National Forest Management Act Prohibits The Forest Service From Using Evenaged Management As The Primary Method Of Timber Harvesting Within A Particular Forest

In *Sierra Club* v. *Espy*, 38 F.3d 792, 799 (1994), the Fifth Circuit stated that

> the Forest Service may use even-aged management as an overall management strategy. That even-aged management must be the optimum or appropriate method to accomplish the objectives and requirements set forth in an LRMP does not mean that even-aged management is the exception to a rule that purportedly favors selection management. Similarly, the requirement that even-aged logging protect forest resources does not in itself limit its use. Rather, these provisions mean that the Forest Service must proceed cautiously in implementing an even-aged management alternative and only after a close examination of the effects that such management will have on other forest resources.

After reviewing the Act's legislative history, the Fifth Circuit concluded that the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management." *Id.* at 800.

The Fifth Circuit's resolution of the issue is clearly correct. Nothing in the NFMA can plausibly be construed to require that unevenaged management must be used as the predominant method of timber harvesting, either within a particular forest or in the National Forest system as a whole. Rather, the statute requires that evenaged management be "carried out in a manner" that is "consistent" with protection of various resources and regeneration of the timber resource. 16 U.S.C.

1604(g)(3)(F)(v). If that standard is satisfied with respect to each use of evenaged techniques, the NFMA imposes no numerical limit on the percentage of timber that may be harvested through the use of evenaged methods.

B. The Forest Service Adequately Explained And Supported The Timber Harvesting Projections Contained In The Wayne LRMP

As we explain above, formulation of an LRMP is simply one part of the process by which the Forest Service makes timber harvesting decisions applicable to a particular unit of the National Forest system. After the plan is adopted, the agency proposes specific timber sales and harvest methods and conducts inquiries into the likely environmental consequences of each proposal. If this Court concludes that the LRMP provisions at issue here are properly subject to facial challenge, judicial review must still take account of the plan's role in the overall decisionmaking scheme. Thus, a reviewing court would inquire whether the Forest Service has adequately explained and supported the necessarily tentative plan projections that are the subject of respondents' challenge —not whether the agency has undertaken the complete analysis for determining whether each individual timber harvesting activity will actually go forward.[34]

[34] The NFMA requires the Forest Service to ensure that specified criteria have been met before employing various forms of evenaged management. See 16 U.S.C. 1604(g)(3)(F)(i)-(v). The NFMA does not state, however, that the requisite determinations must be made at the plan level. In rejecting the administrative appeal filed by Citizens Council in this case, the Chief of the Forest Service emphasized that, under longstanding agency practice, "certain specific findings required by NFMA, including determinations on the appropriateness of evenaged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." Pet. App. 98a-99a. There is consequently no basis for respondents' contention that the Wayne LRMP is arbitrary or unlawful because "the plan lacks site-specific determinations that clearcutting is

In the instant case, the district court addressed and rejected respondents' challenges to the policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The administrative record supports the agency's projections concerning the harvesting methods that appeared likely to be appropriate for various areas of the forest. The fact that those projections have to a significant degree failed to materialize does not mean that the projections were arbitrary when made; it simply shows that the Forest Service's overall decisionmaking process provides mechanisms for ensuring that changed circumstances are taken into account in applying programmatic guidance to individual project decisions over the life of the plan.

Appendix C of the Wayne LRMP, which describes the "management prescriptions" assigned to various areas of the forest, discusses in detail the harvest methods to be considered in planning timber sales, and the expected results and consequences from the use of each method. Appendix C also sets forth the criteria for choosing among the available harvest methods, and identifies the methods that are likeliest to achieve the goals of each management prescription and forest type. Based on the desired and expected condition of the forest following a harvest, Appendix C predicts whether clearcutting or shelterwood cutting is likely to be the best harvest method for each forest type found on the Wayne for which evenaged management is projected. For example, it states that "[c]learcutting is optimum to regenerate the yellow poplar type because it is the only method which provides

the 'optimal' method of harvesting timber in the Wayne." J.A. 19 (second amended complaint).

sufficient light to achieve adequate stocking and growth of yellow poplar." Plan App. C-6. For the oak-hickory type, it states that clearcutting is the optimum method for regenerating high-quality stands and lists a variety of factors supporting its conclusion. *Id.* at C-6 to C-7. The court of appeals did not address those explanations or offer any basis for concluding that the Forest Service had failed to justify the projections contained in the plan.

The Forest Service developed seven alternative plans that would use the available resources in various combinations to address issues of concern to the public. See Draft EIS (DEIS) App. B, Pt. 7. The objective of that process was to identify a plan that would provide maximum long-term public benefits in an environmentally sound manner. DEIS B1-2. The Forest Service analyzed various management scenarios providing a full range of multiple-use opportunities, including dispersed and developed recreation, wildlife habitat, and a variety of timber products. DEIS Ch. 4. The "preferred alternative" selected by the Forest Service reflected a reduction (as compared to the previous pre-NFMA timber management plan for the Wayne National Forest) both in the land area determined to be "suited for timber production" and in the amount of timber that would be produced, and an increase in the amount of land set aside for semi-primitive, non-motorized recreation. See Final EIS (FEIS) H-13; DEIS 2-50, B3-39. It was selected as the alternative likely to provide the best balance of various goods, services, and amenities, including recreational opportunities, development of natural forest conditions and habitat, and timber. ROD 3-4.

After receiving public comment on the draft plan and EIS, the Forest Service further reduced the timber production projections (FEIS 1-20; ROD 19); further increased the amount of land to be managed for semi-primitive non-motorized recreation (ROD 11), "natural

forest" and potential research natural areas (FEIS 1-3); expanded species protection measures to include standards and guidelines for "species of concern" in addition to threatened and endangered species (*ibid.*; ROD 16-17); and added construction of 10 miles of hiking trail (FEIS 1-3). The FEIS explained its rationale for those changes. See FEIS 1-2 to 1-4.

The court of appeals asserted that "the Forest Service has a history of preferring timber production to other uses," and that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." Pet. App. 7a. The court's allegation of bias is extraordinary in two respects. First, the court identified no evidence that improper bias had tainted the Forest Service's development of the Wayne LRMP, but directed its indictment at the agency as a whole. The record in this case provides no basis on which the court of appeals could evaluate the Forest Service's overall management of the National Forest system; nor is such an evaluation an appropriate exercise of judicial power. Second, the court's allegation of improper bias was based in substantial measure on its perception that various *statutory* provisions created incentives for the Forest Service to act in what the court believed to be inappropriate ways. *Id.* at 7a-8a; see Pet. 14-15. It is bizarre, however, to suggest that an agency displays improper bias by acting in a manner consistent with the pertinent statutory scheme. The courts "generally accord Government records and official conduct a presumption of legitimacy." *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991). The court of appeals offered no cogent explanation for departing from that practice here.

In short, the Forest Service adequately explained and supported the determinations made in the LRMP re-

garding the emphasis to be placed on timber harvesting generally and the methods of harvesting that were deemed likely to be appropriate for various areas of the forest. Although the agency's actual management of the Wayne National Forest has diverged substantially from the projections contained in the plan, that divergence does not cast doubt on the rationality of the LRMP itself. It simply reflects the fact—recognized by the Chief of the Forest Service at the time he affirmed the Regional Forester's decision to approve the plan, see pp. 7-9, *supra*—that the LRMP never purported to set forth final, binding decisions regarding the individual timber sales to be undertaken during the life of the plan. Thus, if this Court holds that respondents' facial challenge to the Wayne LRMP is justiciable, the court of appeals' decision should be reversed on the merits.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss on the ground that respondents' suit is unripe and therefore nonjusticiable. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
Attorney

DECEMBER 1997

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

PATTI A. GOLDMAN
TODD D. TRUE
AMY SINDEN
EARTHJUSTICE LEGAL
DEFENSE FUND
705 Second Avenue, Suite 203
Seattle, Washington 98104
(614) 221-1160

FREDERICK M. GITTES
Counsel of Record
SPATER, GITTES, SCHULTE
& KOLMAN
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

Of Counsel:

ALEX LEVINSON
SIERRA CLUB
85 Second Street, Second Floor
San Francisco, California 94105
(415) 977-5500

Attorneys for Respondents Sierra Club and Citizens Council on Conservation and Environmental Control

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Is a forest plan challenge justiciable where frequent forest users challenge the plan's definitive multiple use determination and binding zoning regime?

2. Did the Sixth Circuit Court of Appeals correctly find the Wayne National Forest Plan arbitrary and capricious because it undervalues wilderness recreation, ignores logging's adverse impact on such recreation, and instead commits the forest to providing recreational and logging opportunities that are already prevalent in the region?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

I. FOREST PLANS 2

A. NFMA's Public Forest Planning Process Produces An Integrated Forest Plan Based On A Multiple Use Determination 2

B. The Forest Plan Multiple Use Determination Strikes A Balance Among Competing Demands And Superimposes A Zoning Regime On The Forest ... 5

II. THE WAYNE NATIONAL FOREST PLAN 8

A. The Wayne National Forest 8

B. The Wayne National Forest Plan 9

III. PROCEEDINGS BELOW 11

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THIS FOREST PLAN CHALLENGE IS JUSTICIABLE 16

A. This Forest Plan Challenge Is Ripe For Judicial Review 17

Contents

Table of Contents-Continued:

Page

1. Plaintiffs' Challenge To The Wayne National Forest Plan's Multiple Use Determination Is Fit For Judicial Review 17

2. Postponing Review Would Cause Extreme Hardship 21

a. Postponing Judicial Review Would Allow Critical Plan Decisions To Escape Review .. 22

b. Postponing Judicial Review Clashes With The Purpose And Design Of NFMA's Planning Process 26

c. Postponing Judicial Review Would Waste Agency, Judicial, And Public Resources ... 29

B. Sierra Club Has Standing To Challenge The Wayne Forest Plan's Multiple Use Determination 30

1. Sierra Club Is A Proper Party To Bring This Challenge 30

2. Plaintiffs' Injuries Were Sufficiently Imminent Upon Adoption Of The Plan To Satisfy The Temporal Component Of Standing 33

Table of Contents-Continued

Page

3. Causation And Redressability Are Satisfied Because The Plan Alters the Legal Regime and The Forest Service Has The Authority To Implement Its Own Plan Regardless of Intervening Third Party Actions 35

C. Deviations From The Plan Due To Superseding Direction Or Law Do Not Render This Case Moot or Otherwise Nonjusticiable. 39

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE WAYNE FOREST PLAN IS ARBITRARY AND CAPRICIOUS 41

A. The Wayne National Forest Plan Arbitrarily Favors Logging And Motorized Recreation Over Wilderness Recreation 41

B. The Court Need Not Reach the Clearcutting Optimality Issue 47

CONCLUSION 50

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 17, 18, 19
Agins v. City of Tiburon,
447 U.S. 255 (1980) 20

Table of Authorities-Continued:

Page

Allen v. Wright,
468 U.S. 742 (1984) 37
Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 17
Bennett v. Spear,
117 S. Ct. 1154 (1997) 18, 33, 36
Citizens for Environmental Quality v. Espy,
731 F. Supp. 970 (D. Colo. 1989) 46
City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 33, 37
County of Los Angeles v. Davis,
440 U.S. 625 (1979) 40
Duke Power Co. v. Carolina Environmental Study Group,
438 U.S. 59 (1978) 18, 26
EPA v. National Crushed Stone Association,
449 U.S. 64 (1980) 21, 29
Flast v. Cohen,
392 U.S. 83 (1968) 30
Friends of the Boundary Waters Wilderness v. Robertson,
978 F.2d 1484 (8th Cir. 1992), *cert. denied*,
508 U.S. 972 (1993) 34
Friends of the Boundary Waters Wilderness v. Thomas,
53 F.3d 881 (8th Cir. 1995) 24, 34, 46
Friends of the Bow v. Thompson,
124 F.3d 1210 (10th Cir. 1997) 24, 31
Gardner v. Toilet Goods Association,
387 U.S. 167 (1967) 30
Idaho Conservation League v. Mumma,
956 F.2d 1508 (9th Cir. 1992) 12, 22, 23
Inland Empire Public Lands Council v. U.S. Forest Service,
88 F.3d 754 (9th Cir. 1996) 31
Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 20

Contents

Table of Authorities-Continued: **Page**

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 28, 33, 37
Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 19, 32
Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise,
501 U.S. 252 (1991) 21
Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 41
Motor Vehicle Manufacturers Association v. State Farm Mutual. Insurance Co.,
463 U.S. 29 (1983) 41
Mountain States Legal Foundation v. Glickman,
922 F. Supp. 628 (D.D.C. 1995), *aff'd*,
92 F.3d 1228 (D.C. Cir. 1996) 19
Natural Resources Defense Council v. Hodel,
865 F.2d 288 (D.C. Cir. 1988) 38
National Wildlife Federation v. Hodel,
839 F.2d 694 (D.C. Cir. 1988) 38
Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville,
508 U.S. 656 (1993) 21, 32
Pacific Gas & Electric Company v. State Energy Resource Conservation & Development Commission,
461 U.S. 190 (1983) 17, 29
Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 34
Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 20, 21
Reno v. Catholic Social Services,
509 U.S. 43 (1993) 31
Resources Ltd. v. Robertson,
35 F.3d 1300 (9th Cir. 1994) 24

Contents

Table of Authorities-Continued: **Page**

Seattle Audubon Society v. Lyons,
871 F. Supp. 1291 (W.D. Wash. 1994),
aff'd, 80 F.3d 1401 (9th Cir. 1996) 19, 25
Sierra Club v. Cargill,
11 F.3d 1545 (10th Cir. 1993) 26
Sierra Club v. Espy,
38 F.3d 792 (5th Cir. 1994) 49
Sierra Club v. Lyng,
694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) 25
Sierra Club v. Morton,
405 U.S. 727 (1972) 22
Smith v. United States Forest Service,
33 F.3d 1072 (9th Cir. 1994) 31
Suitum v. Tahoe Regional Planning Agency,
117 S. Ct. 1659 (1997) 20
United States v. New Mexico,
438 U.S. 699 (1978) 42
Village of Euclid v. Ambler Realty Company.,
272 U.S. 365 (1926) 20
Warth v. Seldin,
422 U.S. 490 (1975) 16
West Virginia Division of the Izaak Walton League v. Butz,
522 F.2d 945 (4th Cir. 1975) 3
Whitmore v. Arkansas,
495 U.S. 149 (1990) 37

Statutes:

Weeks Act,
16 U.S.C. § 515 ..... 8, 42
Multiple-Use Sustained-Yield Act,
16 U.S.C. §§ 528-531 2

Contents

Table of Authorities-Continued: **Page**

Wilderness Act,
16 U.S.C. §§ 1133-1136 7
Wild and Scenic Rivers Act,
16 U.S.C. §§ 1271-1287 7
Endangered Species Act,
16 U.S.C. § 1536(a)(2) 36
National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949
16 U.S.C. § 1604 1
16 U.S.C. § 1604(a) 3
16 U.S.C. § 1604(b) 3, 5
16 U.S.C. § 1604(d) 3, 4
16 U.S.C. § 1604(e) 3
16 U.S.C. § 1604(f) 3, 5, 8
16 U.S.C. § 1604(g) 3, 4, 6, 7, 25, 27, 47, 48
16 U.S.C. § 1604(i) 5, 36
16 U.S.C. § 1604(k) 6, 7
16 U.S.C. § 1611(a) 8
Surface Mining Control and Reclamation Act of 1977,
30 U.S.C. § 1276(a)(1) 38
National Environmental Policy Act,
42 U.S.C. § 4332 4
Outer Continental Shelf Lands Act,
43 U.S.C. § 1349(c)(3) 38
Organic Act of 1897, ch. 2, 30 Stat. 34-36
(current version at 16 U.S.C. § 551) 2

Regulations:

36 C.F.R. § 217 4
36 C.F.R. § 217.8 28
36 C.F.R. § 217.17 18

Contents

Table of Authorities-Continued: **Page**

36 C.F.R. § 217.18 ..... 5, 18
36 C.F.R. § 219.1 ..... 3, 4, 5
36 C.F.R. § 219.4 4
36 C.F.R. §219.6 ..... 3, 4
36 C.F.R. § 219.10 ..... 4, 5
36 C.F.R. § 219.11 ..... 3, 7, 27
36 C.F.R. § 219.12 ..... 3, 4, 6, 27, 42, 43
36 C.F.R. § 219.14 ..... 6, 7, 19, 42
36 C.F.R. § 219.16 8
36 C.F.R. § 219.18 7
36 C.F.R. § 219.19 ..... 4, 7, 25, 27
36 C.F.R. § 219.21 ..... 43, 45
36 C.F.R. § 219.25 ..... 6, 7
36 C.F.R. § 219.27 ..... 7, 47
36 C.F.R. § 223.30 5
36 C.F.R. § 223.39 5
36 C.F.R. § 223.40 5
40 C.F.R. § 1501.4 27
57 Fed Register 43,180 (1992) 27

Legislative History:

122 Cong. Rec. 27,625 (1976) 49
122 Cong. Rec. 27,648 (1976) 49
Department of Interior & Related Agencies Appropriations Act of 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. § 1612 note) 4
Department of the Interior & Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, 101st Cong., 2d Sess., Tit. II, 104 Stat. 1942 (1990) 40
H. Conf. Rep. No. 101-971, 101st Cong., 2d Sess. (1990) 40

Contents

Table of Authorities-Continued: *Page*

Miscellaneous:

USDA Decision on Administrative Appeals of Forest Plans for the San Juan, Grand Mesa, Uncompahgre, & Gunnison National Forests (1985) 45
Anderson & Wilkinson, *Land and Resource Planning in the National Forests*, 64 Oregon L. Rev. 1 (1985) 2, 4
Teeguarden, *Benefit-Cost Analysis in National Forest System Planning: Policy, Uses & Limitations*, 17 Envtl. 393 (1987) 29

No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case challenges the multiple use determination and zoning regime established for the Wayne National Forest in the forest plan adopted under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604. Specifically, plaintiffs claim that the plan's multiple use determination arbitrarily undervalued wilderness recreation, which is in short supply in southeastern Ohio, and instead committed to create timber and motorized recreational opportunities, which are already prevalent in the region. As a result of this error, the plan zones the forest in a way that fails to set aside sufficient areas to meet the public demand for wilderness recreation and that subjects the remaining, unprotected areas

to numerous activities, such as motorcycle trail use, extensive road networks, and logging, which interfere with plaintiffs' ability to enjoy undisturbed backcountry recreation. To understand why this case is both justiciable and meritorious, it is necessary to review the NFMA forest plan scheme, in general, and the Wayne forest plan, in particular.

I. FOREST PLANS

A. NFMA's Public Forest Planning Process Produces An Integrated Forest Plan Based On A Multiple Use Determination.

A tension between preserving pristine natural forests and logging has pervaded forest management since the inception of the national forest system. In the late nineteenth century, soon after it established the first forest reserves, Congress resolved a dispute over whether to permit commercial timber sales by delegating broad authority to the federal agency managing the national forests. *See* Organic Act of 1897, ch. 2, 30 Stat. 34-36 (current version at 16 U.S.C. §§ 473-482, 551).

Following World War II, both timber production and recreational use of national forests increased markedly. Anderson & Wilkinson, *Land & Resource Planning in the National Forests*, 64 Oregon L. Rev. 1, 28-29, 321-24 (1985). Congress responded to these competing demands by enacting the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-531. The Act directs the Forest Service to manage the national forests not simply for timber production, but also for uses with non-economic benefits, such as recreation, wildlife, watershed protection, and fish. Despite the MUSYA mandate, the Forest Service continued to expand both logging and the method of logging known as clearcutting, which removes all trees in a large block. The controversy surrounding clearcutting soon found its way into

the courts, reaching a crescendo when the Fourth Circuit held that the practice violated the Organic Act. *West Virginia Div. of the Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975).

Congress' response to this continuing tension was NFMA, which restricts Forest Service discretion to embark on intensive logging regardless of environmental impacts. Under NFMA, each national forest must protect watershed conditions, soil productivity, and biological diversity, and may allow clearcutting only if it is the optimum logging method. 16 U.S.C. § 1604(g)(3)(E)(i) & (F)(i).

Of particular relevance to this case, NFMA establishes an orderly, public process for reconciling competing demands for use of each national forest. *Id.* § 1604(d)-(g); 36 C.F.R. §§ 219.6, 219.12. The forest plan (called a Land and Resource Management Plan ("LRMP")) is the vehicle for striking the multiple use balance among competing demands for commercial exploitation, recreation, and the ecological needs of wildlife, watersheds, and forest habitat. 16 U.S.C. § 1604(a), (e). Each forest plan must make a multiple use determination "that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). The plan then converts this determination into a zoning regime, binding standards, and objectives that control and drive forest activities. 16 U.S.C. § 1604(b); 36 C.F.R. §§ 219.1(b), 219.11.

In developing forest plans, the Forest Service must "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b), (f)(1) & (3). This approach recognizes that "the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems." 36

C.F.R. § 219.19(b)(3). NFMA's comprehensive forest plan approach stands in stark contrast to the previous practice of developing separate plans for each major type of forest use. Anderson & Wilkinson, *supra*, at 31.

The NFMA forest planning process requires substantial public input. 16 U.S.C. § 1604(d); 36 C.F.R. §§ 219.1(b)(11), 219.6, 219.12. Most significantly, the Act merges into one integrated decisionmaking process NFMA's multiple use determination and preparation of an environmental impact statement under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. *See* 16 U.S.C. § 1604(g)(1); 36 C.F.R. §§ 219.10(a), 219.12. The environmental impact statement must assess a broad range of reasonable alternatives that reflect different mixes of forest uses. 36 C.F.R. §§ 219.4(b)(3), 219.10(b), 219.12. Based on the final environmental impact statement, the Regional Forester must compare the plan endorsed by the Forest Supervisor to alternatives that are environmentally preferable or more cost effective. *Id.* §§ 219.4(b)(3), 219.10(c), 219.12(i)-(j). The Regional Forester then decides whether to approve the proposed plan. *Id.* §§ 219.4(b)(3), 219.12(j).

The approval, amendment, or revision of a forest plan is subject to an administrative appeal in accordance with prescribed regulatory procedures. *Id.* §§ 217, 219.10(d).[1] The NFMA regulations state that a forest plan administrative appeal decision is "the final administrative decision of the Department of Agriculture," and that, by adhering to these procedures, "appellants and intervenors shall be deemed to

[1] The NFMA regulations have long afforded administrative appeals for both forest plans and individual projects. Congress provided statutory direction for the project appeal process in Department of Interior & Related Agencies Appropriations Act of 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. § 1612 note), but did not alter or undermine the forest plan administrative appeal regulations.

have exhausted their administrative remedies for purposes of judicial review." *Id.* § 217.17(g); *see also id.* § 217.18 (failure to pursue a plan appeal renders judicial review premature and inappropriate).

Forest plans adopt a legally binding zoning regime and rules that govern management of the particular national forest. 16 U.S.C. § 1604(b). The plans "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. § 219.1(b). All site-specific activities in the forest must comply with the forest plan; if a site-specific activity is not consistent with the plan's zoning and rules, it cannot go forward. 16 U.S.C. § 1604(i) ("[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans"); *accord* 36 C.F.R. §§ 219.10(e), 223.30, 223.39, 223.40.

Forest plans must be revised every ten or, at the most, 15 years. 16 U.S.C. § 1604(f)(5); 36 C.F.R. § 219.10(g). A plan may be revised earlier to respond to significant changes in forest conditions, public demands, or new agency policies or direction. Short of a full-blown revision, plans may be amended during their life to respond to less drastic changes, such as reductions in appropriated funds. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10(e)-(f). Revisions and significant plan amendments must be adopted in accordance with the NFMA process for developing forest plans. 16 U.S.C. § 1604(f)(4)-(5); 36 C.F.R. § 219.10(f)-(g).

B. The Forest Plan Multiple Use Determination Strikes A Balance Among Competing Demands And Superimposes A Zoning Regime On The Forest.

The heart of forest plan development is a three-stage suitability determination – NFMA's formula for striking the

balance among competing multiple uses of the forest. 16 U.S.C. § 1604(g)(2)(A), (k). The first stage identifies lands that are physically suitable for timber production. Areas assigned to certain environmentally protective regimes, such as wilderness, historic preservation sites, and research areas reflecting natural habitat conditions, are automatically off-limits to timber production. 36 C.F.R. §§ 219.14(a)(4) & (c)(1), 219.25. Other lands must be deemed physically unsuitable if logging using available technology will cause excessive damage to soils, water conditions, or fish habitat, 16 U.S.C. § 1604(g)(3)(E)(i), (iii); 36 C.F.R. § 219.14(a)(2), or if the lands cannot be restocked with trees within five years of the logging. 16 U.S.C. § 1604(g)(3)(E)(ii); 36 C.F.R. § 219.14(a)(3).

The second stage of the suitability analysis, which applies to those lands found to be physically suitable for timber production, consists of a strictly monetary comparison of "the direct costs of growing and harvesting trees . . . to the anticipated receipts to the government" from timber sales. 36 C.F.R. § 219.14(b). However, lands may not be designated for logging simply because logging results in the greatest dollar return. 16 U.S.C. § 1604(g)(3)(E)(iv).

Instead, at the final stage, the suitability analysis adds to the equation both the costs and benefits of other forest uses, such as outdoor recreation, watersheds, wildlife, fish, and wilderness. 36 C.F.R. § 219.14(c). A plan environmental impact statement must contain a cost-benefit analysis for each alternative management scenario, resulting in projections of the extent to which each plan option *as a whole* will protect environmental resources, produce timber, and satisfy public demands for other uses. *Id.* § 219.12(e)-(h). This third stage comparison is designed to identify "the alternative that comes nearest to maximizing net public benefits" – the charge of the multiple use determination. *Id.* § 219.12(f).

As a result of NFMA's three-tiered multiple use determination, land is deemed unavailable for logging where it is physically unsuitable, or where logging either would not be cost effective or would be incompatible with other management objectives, such as protecting water quality, wildlife habitat, or recreational opportunities. *Id.* § 219.14(a) & (c); *see also* 16 U.S.C. § 1604(g)(3)(E). No logging may be scheduled on physically or economically unsuited lands until the plan is changed. 16 U.S.C. § 1604(k); 36 C.F.R. §§ 219.14(d), 219.27(c)(1).

The forest plan translates this multiple use determination into a map, which zones the forest into management areas subject to distinctive management regimes. 36 C.F.R. § 219.11(c). The plan creates environmentally protective regimes, generally foreclosing or restricting exploitation of resources and habitat degradation, in areas recommended for wilderness or wild and scenic river designation, historic preservation sites, and research natural areas. *Id.* §§ 219.14(a)(4) & (c)(1), 219.18, 219.25.[2] Outside these protected areas, the plan establishes management area regimes to provide for various mixes of wildlife habitat, recreation, and commercial activities. Thus, in some areas, the plan imposes constraints on activities that will degrade essential wildlife habitat or impede its use by the desired species. *Id.* §§ 219.19, 219.27(g). Moreover, where undisturbed backcountry recreation is the plan objective for an area, the plan limits activities that alter the environment or interfere with wilderness recreation. In contrast, other areas

---

[2] Forest plans make the final agency decision to recommend for or against designation of areas for protection under the Wilderness Act, 16 U.S.C. §§ 1133-1136, and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. Areas recommended for statutory protection are managed in accordance with that status until Congress acts on the recommendation. 16 U.S.C. § 1283(a); 36 C.F.R. § 219.14(c)(1).

may be designated for developed recreation sites, extensive road traffic, or off-road vehicle trail use. In addition, the plan determines the intensity and types of timber production and other commercial activities permitted in each management area.

Based on the multiple use determination, the plan also sets the allowable sale quantity ("ASQ") – a volume of timber production that may not be exceeded and that must be low enough to ensure a perpetual, sustained yield of timber. 16 U.S.C. § 1611(a). Finally, forest plans contain a timber sale schedule, drawn from both the ASQ and the multiple use determination, which often specifies the expected location, acreage, volume, roadbuilding requirements, and logging methods for the sales. *Id.* § 1604(f)(2); 36 C.F.R. § 219.16.

II. THE WAYNE NATIONAL FOREST PLAN

A. The Wayne National Forest

In the 1930's, the Forest Service and the State of Ohio identified an 800,000-acre area in southeastern Ohio where the federal government intended to purchase depleted mineral, forest, and agricultural lands and establish a national forest. *See* Land & Resource Management Plan ("LRMP") at 3-1. In 1951, under the authority of the Weeks Act, 16 U.S.C. § 515, the Secretary of Agriculture formally established the Wayne National Forest consisting of lands acquired in the purchase area. A. Lavelle, *Landscape Perceptions of the Wayne National Forest* at 1, 18-33 (1985) (in Vol. 1, Tab 49. Record for Sierra Club's Plan Administrative Appeal, hereinafter "Sierra Club Record").

The Wayne National Forest consists of fragments of federally owned land concentrated in three areas, totaling close to 180,000 acres. LRMP at 3-1. The federally owned lands are intermingled with private lands where little natural forest remains and road densities are high. *Id.* at 3-1, 3-2 &

3-7; Record of Decision ("ROD") at 7; Pet. App. at 45a. Throughout southeastern Ohio, cut-over pasture-like habitat is plentiful, and populations of game species, such as deer and ruffed grouse that depend on such habitat, have been thriving. *See* ROD at 16; Sierra Club Record, Vol. 1, Tab 49.

The Wayne National Forest is located in the sixth most populous state in the nation, within 100 miles of five population centers. LRMP at 1-2. Not surprisingly, given Ohio's population densities and the dearth of public forest land in the state, the forest is extremely important for outdoor recreation opportunities. *Id.* at 3-1.

B. The Wayne National Forest Plan

In the mid-1980's, the Forest Service began the NFMA planning process for the Wayne National Forest. At the outset, the Forest Service identified logging and a variety of recreational uses as the predominant demands for the forest. Many forest users, including plaintiffs' members, sought increased opportunities for hiking and other forms of wilderness recreation. ROD at 11.

In January 1987, the Forest Service sought public comment on its proposed plan and draft environmental impact statement ("DEIS"), which embodied its preliminary multiple use determination. Many proponents of wilderness recreation, including plaintiffs, called for significant increases in the amount of forest designated as management area 6.2, which prohibits motorized recreation, calls for road closures to foster backcountry recreation, and prohibits any interference with the natural forest. Final Environmental Impact Statement ("FEIS") at 2-7, 2-12, 2-25, 2-26, 2-32, 2-65; LRMP at 4-124 to 4-128. Management area 6.2 is the only zoning regime under which the probability of experiencing isolation, solitude, and closeness to nature is high. LRMP at 4-124, 4-127.

The final forest plan, adopted in January 1988, established 12 management areas, each designed to promote a different mix of forest uses. The management standards for these areas dictate whether, and the extent to which, logging, facilities construction, herbicide spraying, use of heavy machinery, grazing, utility corridors, horseback riding, and off-road vehicles, are allowed, and whether non-essential roads will be closed and hiking trails will be built to promote nonmotorized recreation. *See id.* at 3-3.

Although the final plan increased slightly to 10% of the forest the total acreage assigned to management area 6.2, the plan still would satisfy only half the public demand for backcountry recreation. ROD at 6, 29-30, 34.[3] At the same time, the final plan increased the amount of designated off-road vehicle trails over that proposed in the draft plan to 250 miles of trails over 36,000 acres. ROD at 3, 14. In addition, the plan allows logging throughout more than 70% of the forest, including in one of the two management areas that require significant road closures to promote nonmotorized recreation. LRMP at 3-3, 4-7. Even though these timber sales would generally lose money, the plan nonetheless calls for such logging as a way to generate additional foraging habitat for game species and thereby promote hunting. *Id.* at 3-5. As a result of the plan's motorized recreation and logging activities, the plan acknowledges that, outside management area 6.2, there is "a low probability of experiencing isolation from sights and sounds of people, independence, closeness to nature, and tranquility." LRMP at

[3] The plan protects additional discrete areas (which together comprise less than 10% of the forest) for potential historic sites, research natural areas, developed recreation sites, and three fishable/canoeable stream corridors. LRMP at 4-141 to 4-161, 4-177 to 4-179. However, these areas are not reserved for and, in some instances, are incompatible with undisturbed wilderness recreation.

4-86; *accord id.* at 4-75, 4-80, 4-83, 4-94, 4-100, 4-107, 4-111.

Both plaintiffs appealed the plan, and representatives of the timber industry, hunters, and oil and gas lessees intervened in the appeals. Pet. App. at 66a-67a, 78a-79a. In their administrative appeals, plaintiffs claimed that the plan arbitrarily overemphasized logging and the type of recreational opportunities in ample supply in the region at the expense of undisturbed forest and wilderness recreation, opportunities the forest is in a unique position to supply. Sierra Club Record, Vol. 3, Tab 131; Pet. App. at 72a-74a, 107a, 113a-114a, 120a-123a.

In November 1990 and January 1992, the Forest Service denied the appeals in what it characterized as final administrative decisions. Pet. App. at 76a-77a, 98a-99a. The appeal decisions acknowledged that the plan makes final decisions about how to balance and provide for multiple uses, but took the position that the plan made only tentative decisions regarding the preferred logging methods for individual timber sales. *Id.* at 75a, 87a, 93a.

III. PROCEEDINGS BELOW

In March 1992, plaintiffs filed this lawsuit, asserting numerous violations of NFMA and NEPA in the plan's allocation of too little forest to wilderness recreation and too much to game habitat, motorized recreation, logging, and other activities that interfere with wilderness recreation. *Id.* at 133a-145a; JA 16-21. The second amended complaint alleges that plaintiffs' members regularly visit the Wayne National Forest for recreational purposes, including hiking, birdwatching, and camping, and for professional and scientific pursuits. JA 13.[4]

[4] The complaint alleged specific legal defects in the plan environmental (Cont'd)

In March 1994, the United States District Court for the Southern District of Ohio granted summary judgment to the federal defendants. Pet. App. at 10a-48a. Neither the government, nor Ohio Forestry Association, which intervened as a defendant, raised justiciability concerns in the district court.

On January 21, 1997, the Court of Appeals for the Sixth Circuit reversed and remanded. Responding to arguments raised by the government for the first time on appeal, the court held that plaintiffs have standing to challenge the plan:

> Land and Resource Management Plans represent significant and concrete decisions that play a critical role in Forest Service actions. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge." If the Sierra Club was allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the National Forest Management Act "would forever escape review."

Id. at 4a (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). The court of appeals also held that the challenge was ripe for review: "Plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan." Pet. App. at 4a.

On the merits, the court reversed because the Forest Service "made arbitrary assumptions in the Wayne planning process that biased the plan toward timbering." *Id.* at 3a. By

---

(Cont'd)
impact statement, its suitability determination, its objectives that call for extensive even-aged management, including clearcutting, and the plan's failure to make certain decisions. JA 17-25.

emphasizing the value of creating game habitat through logging, the forest plan is based on the assumption that logging "will provide new opportunities for recreation" and "enhance the diversity of plant and animal communities." *Id.* at 6a. This assumption ignored evidence that "the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of" game habitat, and much of the Wayne itself has been logged or developed. *Id.* In contrast, the court observed: "Timbering does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting." *Id.* Judge Batchelder concurred in the decision, except for *dictum* regarding the Forest Service's built-in incentives to favor logging over other forest uses. *Id.* at 9a.

During the pendency of the petition for a writ of certiorari, several developments occurred. First, on remand from the court of appeals, plaintiffs filed a motion for summary judgment supported by affidavits from three of their members. One affiant is a repeat visitor to most of the forest's recreational facilities, key landmarks, and hiking trails, and the author of a natural history guide featuring the Wayne National Forest. Affidavit of Stephen J. Ostrander (Aug. 25, 1997). Another affiant leads hikes for the Sierra Club throughout the Wayne National Forest, including in areas that are not preserved for wilderness recreation in the plan. Affidavit of David Scott (Aug. 25, 1997). The third affiant regularly hikes, camps, observes birds and wildlife species, and studies the forest types in the Wayne National Forest. His affidavit identifies 17 specific areas that he frequents outside management area 6.2, many of which were opened to off-road vehicles by the plan. Affidavit of Jason Tockman (Aug. 25, 1997). Moreover, two of the affiants regularly hike at the sites of two timber sales awarded and partially logged during the pendency of the litigation.

Ostrander Aff. ¶ 7; Tockman Aff. ¶ 8. Based on the Sixth Circuit decision, the district court issued a preliminary injunction prohibiting further logging of these two timber sales. Order, No. C2-92-249 (S.D. Ohio, Sept. 5, 1997).

Second, the Wayne Forest Supervisor announced that the forest plan will be amended "to bring its vegetation management projections into conformity with what has happened on the ground since the 1988 Forest Plan approval and with what is expected to happen in the future." Letter from José A. Zambrana (Aug. 29, 1997). More specifically, the announcement indicates that a 1992 Forest Service directive from the Chief of the Forest Service to limit clearcutting, coupled with an unbroken series of appropriations riders restricting clearcutting on the Wayne National Forest to 25% of 1989 levels, has resulted in a significant decrease in clearcutting on the forest. *Id.* The Forest Supervisor did not, however, suspend logging or other activities implementing the plan.[5]

SUMMARY OF ARGUMENT

Challenges to NFMA-mandated decisions definitively made in a forest plan are ripe for review where resolution of the challenge is not dependent upon subsequent project implementation. The Wayne forest plan definitively made the NFMA-mandated multiple use/suitability determination for the Wayne National Forest and, based on that determination, established a zoning regime that prescribes how much of the forest is set aside for wilderness recreation and how much is subject to motorized recreation and logging.

[5] The affidavits, district court order, Forest Supervisor's letter, and Chief of the Forest Service's clearcutting directive have been lodged with the Clerk by petitioner and the government.

Subsequent project decisions will not revisit or elucidate the plan's multiple use/suitability determination. Instead, once the agency resolves any administrative appeals of the plan, which the NFMA regulations characterize as the final agency action appropriate for judicial review, the plan's multiple use determination and zoning regime are final, fixed, and binding until the plan is revised or amended. In implementing the plan, the Forest Service will simply design projects to fit within the plan's zoning regime, without revisiting the wisdom or propriety of the plan's multiple use balance. The agency will not pursue activities to promote wilderness recreation by, for example, closing roads, where that is not an objective of the plan. Therefore, such plan priorities and directives cannot be addressed by challenging projects. Moreover, each individual project, viewed in isolation, fails to present fully the mandatory suitability analysis underlying the plan's multiple use determination. Relegating review of the plan's multiple use determination to individual project challenges would miss the forest for the trees. Because review postponed will be review denied, plaintiffs' challenge to the Wayne forest plan's multiple use determination is ripe.

Plaintiffs also have standing to challenge the Wayne forest plan's multiple use determination. As regular users of the Wayne National Forest for hiking, birdwatching, camping, and wildlife study, plaintiffs' members are adversely affected by the plan's decision to protect only 10% of the forest for undisturbed backcountry use. In other parts of the forest, the plan mandates no affirmative steps, like closing all non-essential roads, to promote wilderness recreation. Instead, in those areas, the Forest Service will actively pursue and permit a full range of activities that interfere with wilderness recreation, such as motorcycle trail use, roadbuilding, development of utility corridors,

and logging. The combined effect of these activities impairs plaintiffs' ability to enjoy undisturbed wilderness recreation, quite apart from the logging permitted by individual timber sales. Moreover, by the time the plan administrative appeals were decided so that plaintiffs could file this case, the Forest Service had proceeded with numerous activities, including more than 40 timber sales, in areas not allocated to wilderness recreation. Not only was the injury from the plan imminent; it had already begun to occur.

On the merits, the plan arbitrarily allocated too little forest to wilderness recreation and too much to even-aged logging, and clearcutting in particular. The Forest Service erred because it erroneously concluded that creation of habitat for game species rendered such logging beneficial to recreation and wildlife diversity. The Forest Service's depiction of clearcutting as unequivocally beneficial disregarded logging's adverse impacts on wilderness recreation and extensive evidence of unfulfilled demand for this kind of recreation in and around the Wayne National Forest.

ARGUMENT

I. THIS FOREST PLAN CHALLENGE IS JUSTICIABLE.

The justiciability question – whether plaintiffs may bring this challenge upon final adoption of the forest plan - is one of timing, implicating both standing and ripeness considerations. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness - whether the harm asserted has matured sufficiently to warrant judicial intervention"). Under both doctrines, plaintiffs' challenge to the Wayne forest plan is justiciable.

A. This Forest Plan Challenge Is Ripe For Judicial Review.

Plaintiffs agree with the government that this case should be decided under the ripeness doctrine. The issue is one of timing, and Article III presents no obstacles to judicial resolution of this case.

The ripeness doctrine calls for a twofold inquiry assessing: "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In conducting this inquiry, the aspect of the forest plan at issue must be the focal point. Forest plans contain broad explanatory discussions of forest conditions and previews of possible projects, which are not ripe for review. In contrast, definitive forest plan decisions, like the NFMA-mandated multiple use determination, are ripe for review because the plan is the final word, judicial review is in no way dependent on plan implementation, and hardship would result from postponing review.

1. Plaintiffs' Challenge To The Wayne National Forest Plan's Multiple Use Determination Is Fit For Judicial Review.

Whether a particular plan decision is fit for review depends on whether the plan makes a final and definitive determination and whether judicial review will benefit from future applications of that plan decision. *Abbott Laboratories*, 387 U.S. at 149, 151-52; *see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Development Comm'n*, 461 U.S. 190 (1983) (purely legal claim ripe; challenge that depended on case-by-case application of statute not ripe); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (facial challenge to election procedures justiciable where application would not

assist judicial inquiry, but not where employers or state bodies had discretion to prevent harm to union); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (1978) (future developments would not advance significantly the court's ability to decide the legal issues).

Like the regulation at issue in *Abbott Laboratories*, 387 U.S. at 151-52, the forest plan is a final agency action, not a tentative determination by a subordinate. The Regional Forester issued a *final* record of decision adopting the plan, along with a *final* environmental impact statement on the plan, and the Chief of the Forest Service issued *final* agency decisions denying plaintiffs' administrative appeals and affirming the plan.[6] Moreover, the plan will remain in place and bind the agency in its management of the forest until superseded by a plan revision, a plan amendment, or an Act of Congress.

Both the government and Ohio Forestry Association concede that some decisions definitively made in a plan are ripe immediately upon the plan's adoption. Gov't Br. at 4 n.2, 22-23 n.16, 12-13 n.9, 27; Pet. Br. at 17. This case challenges such a decision because the Wayne forest plan definitively made the NFMA-mandated multiple use determination and converted that determination into a fixed zoning system and binding rules for the Wayne National Forest. In this respect, the forest plan has "direct and appreciable legal consequences," *Bennett v. Spear*, 117 S. Ct. 1154, 1169 (1997), and it is far more focused and determinative than the broad land withdrawal review program

[6] The government repeatedly asserts that administrative appeals of timber sales lead to final agency decisions ripe for judicial review. Br. at 4 n.3, 35-36. However, the Forest Service's appeals process for forest plans also produces final agency decisions characterized by the NFMA regulations as appropriate for judicial review. 36 C.F.R. §§ 217.17(g); 217.18.

at issue in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990).

For example, a forest plan decides which areas will be recommended for formal wilderness designation and protected under the plan until Congress acts on these recommendations. 36 C.F.R. § 219.14. This decision is final and results in environmentally protective treatment of certain areas, but not others. Certain types of future development in an unprotected area may be a consequence of that determination, but awaiting such developments would not advance a court's ability to evaluate the plan's overall wilderness determination. Nor would such a discrete development be illustrative of the immediate harm caused by the plan's failure to afford greater affirmative wilderness protection throughout the forest. *See infra* at 22-23.

Here, the challenged multiple use determination and zoning scheme is the consummation of the agency's suitability analysis. Judicial review of this determination will be predicated on the plan's administrative record and will not be affected by future administrative proceedings on individual projects. *See Abbott Laboratories*, 387 U.S. at 149 (factors making issues fit for review).

Presumably, Ohio Forestry Association would argue that it could challenge a hypothetical Wayne forest plan that allotted 90% of the forest to wilderness recreation, thereby placing most of the forest off-limits to logging. *See* Pet. Br. at 17; *see also* Gov't Br. at 12-13 n.9. Indeed, the timber industry has often mounted judicial challenges to forest plans that allowed less logging than sought by the industry. *See, e.g., Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (rejecting industry challenge); *Mountain States Legal Found. v. Glickman*, 922 F. Supp. 628 (D.D.C. 1995), *aff'd*, 92 F.3d 1228 (D.C. Cir. 1996) (same). If such an industry claim is ripe because it challenges the immediate closure of so much

of the forest to logging, it makes no sense to require plaintiffs' counter-challenge to the plan's protection of too little of the forest for wilderness recreation to wait for a specific timber sale. Both challenges present issues that are fit for review.

While the Forest Service will subsequently decide which particular timber sales to pursue in management areas where logging is a principal objective, the plan's management area designations and objectives remain fixed for the life of the plan. The court "will be in no better position later than we are now to confront" the legal challenge to the plan's multiple use determination and its consequent land allocations. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144-45 (1974). As in the *Rail Reorganization Act Cases*, the injurious events – activities that impede undisturbed wilderness recreation - are certain to occur and immediate behavior is affected.

As with facial challenges to zoning ordinances, a challenge to the validity of a forest plan's entire multiple use determination is fit for review when the plan is adopted. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). In contrast, a timber sale is analogous to application of a zoning ordinance to particular property, which often, but not always, becomes ripe only upon final application of the ordinance to the property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (challenge to zoning ordinance without final application to plaintiff not ripe, except for question of whether enactment of ordinance itself violated Constitution); *but see Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997) (takings claim ripe before attempts to sell tradable development rights); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (takings challenge ripe before final decision on development permitted on petitioner's property). Where, as here, the challenge is directed at the validity of the zoning regime as a whole, rather

than at any particular application of it, the facial challenge is fit for review. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (facial challenge to validity of regulation limiting availability of variances ripe).

2. Postponing Review Would Cause Extreme Hardship.

Facial challenges that are fit for review are ripe if delaying judicial resolution would cause hardship. As the Court stated in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 143: "Where inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." Indeed, in *Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), companies with a history of regularly bidding on government contracts did not need to bid on particular contracts to challenge a minority set aside. *See also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991) (challenge need not await application of challenged congressional veto to challengers' detriment).

Postponing judicial review would cause hardship to plaintiffs, the Forest Service, and other users of the forest. The hardship resulting from delay takes three forms: (1) delay would deny plaintiffs meaningful review of the plan's multiple use determination and zoning regime; (2) it would defeat NFMA's purpose of establishing the multiple use balance for each forest upfront in a forest plan based on a valid analysis of the demand for and trade-offs between competing forest uses; and (3) it would lead to duplicative challenges to individual projects and wasteful and potentially pointless devotion of resources to plan implementation.

a. Postponing Judicial Review Would Allow Critical Plan Decisions To Escape Review.

Most importantly, postponing review would, in effect, deny review of plaintiffs' challenge to the plan's multiple use determination. This Court has been reluctant to embrace rigid justiciability rules that would allow agency actions to evade review. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). A rule forbidding facial challenges to final forest plan decisions would lead to such an untenable result.

The government seeks to assure the Court that plan determinations may be reviewed if they underlie, "become relevant to," or "bear[] on the propriety of" a particular timber sale. Br. at 32, 39. However, the core decisions made in the plan that dictate the prioritization and zoning of forest activities will rarely manifest themselves in particular timber sales or other individual projects in identifiable and particularized ways.

For example, once a forest plan decides which areas to recommend for formal wilderness designation, the Forest Service does not reconsider that decision in connection with individual projects:

> [P]ossible wilderness recommendations are evaluated during the forest planning process. ... It is during this programmatic step in the Forest Service's decisionmaking process that the agency determines which lands to recommend to Congress for inclusion in the National Wilderness Preservation system.

Idaho Conserv. League v. Mumma, 956 F.2d 1508, 1516 n.17 (9th Cir. 1992) (quoting Forest Service documents). As a result, wilderness decisions made at the forest plan level are

excluded from project-level decisionmaking. *Id.*[7]

Under the Wayne forest plan, management area 6.2 is the only management area set aside for undisturbed backcountry recreation. The goal for areas assigned to management area 6.2 is to provide 2500-acre blocks of natural forest where individuals can experience "considerable solitude" and "closeness to nature." LRMP at 4-124. To accomplish this goal, the plan mandates closing non-essential roads. Such extensive road closures will not be actively pursued in other areas of the forest. Accordingly, no project decisions will provide plaintiffs a vehicle for challenging the failure to embark on such programs throughout a wider area of the forest.

Similarly, in management area 6.2, the plan prohibits logging, herbicides, facilities construction, off-road vehicles, grazing, and mechanized equipment, and it severely limits utility corridors and road construction. *Id.* at 4-124 to 4-128. Conversely, few of these constraints apply in the remainder of the forest. The Forest Service will not revisit the plan's multiple use determination in making individual project decisions in these areas, but instead will simply design projects to fit within the plan's parameters and meet its objectives.

In an overall sense, the multiple use determination bears on the propriety of every timber sale and every other activity taking place under the plan. However, the government insists on a more particularized nexus between individual projects and specific plan decisions before a plan's

---

[7] Consideration of a no action alternative to logging a particular timber sale does not revisit the plan's land allocations or its overall timber sale program. Even if the particular timber sale is dropped, the immediate effects of the management prescriptions for the land allocation will continue to be felt, and other timber sales will follow in order to meet the forest plan's objectives.

multiple use determination is ripe. Identifying such a nexus promises to embroil the courts in cumbersome side-litigation over whether and precisely how plan decisions affect subsequent project decisions.

Ultimately, this search for a direct and particularized nexus may prove pointless. A forest plan's multiple use determination is the engine that drives forest management, but it will rarely surface to the extent demanded by the government in a particular timber sale decision. For example, any cost-benefit analysis conducted at the project stage will focus on the bottom line for a particular timber sale, not on the economic suitability analysis and multiple use balance struck for the forest as a whole.

Similarly, one consequence of the multiple use determination is establishment of an allowable sale quantity ("ASQ") that serves as a ceiling for timber production. The ASQ may be based on an inadequate rationale for permitting money-losing timber sales, it may violate NFMA's sustained yield mandate, or it may be so high that it jeopardizes viability of wildlife species. *See, e.g., Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (Forest Service reduced ASQ significantly while revisiting whether to authorize below-cost timber sales); *Resources Ltd. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994) (Forest Service arbitrarily set ASQ at level its experts believed would harm grizzly bear populations). It is not at all clear how a litigant could prove that the ASQ has become "relevant" to a particular timber sale, unless it is assumed to be relevant to all timber sales, in which case waiting for a particular sale serves no purpose. A search for a more particularized link may delay review of an arbitrary ASQ until it has been reached, even though the ASQ is a driving force behind the forest's entire timber program. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997) (court refused to decide challenge to ASQ as violating

NFMA's sustained yield requirement because timber sale would not push timber production over the ASQ).

Piecemeal judicial review would also be unworkable for certain species' viability determinations. NFMA charges the Forest Service with protecting species viability in forest plans because that is the scale at which species' survival can be assessed and assured. 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19. Waiting for particular timber sales would not enhance an informed assessment of the species' overall needs and the extent to which they are met throughout the forest as a whole under the plan's land allocations. *See Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (challenge to adequacy of forest plan to protect sufficient habitat to ensure viability of certain species); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in pertinent part sub nom., Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (same).

Waiting could also be futile. For example, a forest plan might set road density targets at a level that is too high because the targeted road densities cause grizzly bear fatalities. Yet the plan's targets would limit the number of road closures required on the forest. Since the harm to grizzly bears stems from the forest's failure to close more roads, few, if any, projects would present an opportunity to challenge the flawed aspects of the plan.

Here, the plan's flawed multiple use determination drives all forest activities by dictating where particular forest activities must be (or alternatively, will not be) safeguarded and promoted. Unless the plan's multiple use determination and zoning regime are addressed in a challenge to the plan, they may entirely escape review.

b. Postponing Judicial Review Clashes With The Purpose And Design Of NFMA's Planning Process.

Postponing review of various plan elements until they manifest themselves concretely in a particular timber sale would undermine NFMA's direction to establish each forest's multiple use allocations through a prescribed interdisciplinary and public planning process *before* plan implementation commences. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (delay would undermine Act's purpose to eliminate uncertainty about private liability).

NFMA directs the Forest Service to make the core multiple use allocations for each forest upfront in forest plans. Where, as here, the multiple use determination is predicated on an erroneous undervaluation of wilderness recreation, the flaws in the suitability/multiple use determination infect the entire management regime put into place by the plan. Indeed, the Forest Service acknowledged numerous trade-offs between competing uses. For example, by providing for wilderness recreation and preservation of old-growth forest the plan precludes timber production and creation of habitat for game species. ROD at 16, 31, 32.

Changing one facet of the plan's multiple use determination has a ripple effect on other parts of the plan. For example, a revised suitability determination might require changes to the management area boundaries, the allowable sale quantity, or the road construction and other activities prescribed for each area. *See Sierra Club v. Cargill*, 11 F.3d 1545 (10th Cir. 1993) (changing plan restocking period from seven years to NFMA's mandated five-year period enlarged estimate of physically suitable land, necessitating a new suitability analysis and reassessment of land allocations). Piecemeal review of the plan's multiple use determination through individual project challenges would defeat NMFA's

mandate to have each forest governed from the outset by a comprehensive plan predicated on a valid multiple use determination.[8]

NFMA also mandates a thorough analysis of public demands and the forest's ecological needs through a public, interdisciplinary process that integrates both NEPA's environmental impact statement requirement and the NFMA-mandated suitability analysis. This case challenged the plan's environmental impact statement for failing to include an adequate range of alternative zoning regimes to reflect the recreational uses and forest conditions sought by plaintiffs. Delaying review of the plan's environmental impact statement would defeat the purpose of both NEPA and NFMA to provide a thorough environmental analysis of plan alternatives sufficiently in advance to inform the plan's multiple use determination.[9]

---

[8] Postponing review would also frustrate NFMA's requirement that each plan develop and adopt a forest-wide monitoring program in order to generate sufficient information to ensure that forest activities will protect the forest's environmental resources. 16 U.S.C. § 1604(g)(3)(C); 36 C.F.R. §§ 219.11(d), 219.12(k), 219.19(a)(1). If a litigant must wait and challenge a timber sale in order to obtain review of an inadequate monitoring program, the defects in the program could go uncorrected for years, leaving the forest without the data needed to assess and design projects to avoid environmental harm.

[9] A subsequent environmental impact statement for a timber sale (if one is even prepared) will consider various designs for that sale, not whether more wilderness recreation should be provided throughout the forest as a whole. For many, perhaps most, projects, no environmental impact statement will be prepared. Instead in the Wayne National Forest, the Forest Service prepares a more cursory, "rough-cut" environmental analysis or no further environmental review for projects falling within categorical exemptions from NEPA's environmental impact statement requirement. *See* 40 C.F.R. § 1501.4(a), (b), (e); *see, e.g.*, 57 Fed. Reg. 43,180, 43,209 (1992) (timber sale of 250,000 board feet or less categorically exempt).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992), in addressing issues of timing for justiciability purposes, this Court indicated that no justiciability principles would preclude litigants from seeking "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *See also id.* at 572 n.7 (elaborating on relaxed justiciability inquiry for litigating procedural claims before on-the-ground harm occurs).

Similarly, here, defects in the NEPA analysis of plan alternatives are properly subject to judicial review upon adoption of the plan so that the agency can prepare a proper environmental impact statement and, if necessary, revise the plan's multiple use determination and zoning regime in a timely fashion. Postponing judicial review would delay a valid alternatives analysis until well into the life of the plan when it could no longer serve its designated purpose.

The regulatory process for appealing forest plans further underscores the importance of resolving plan challenges upon adoption of the plan. Under the NFMA regulations, appeals of forest plans must be filed within 90 days of the plan's approval (or amendment or revision). 36 C.F.R. § 217.8(a). Waiting to obtain judicial review of the issues resolved in such appeals would allow uncertainties about the plan's validity to persist well into the life of the plan. A failure to resolve the propriety of a plan's multiple use determination upfront will defeat NFMA's purpose of basing management of each forest on the forest plan's multiple use balance that maximizes net public benefits.

c. Postponing Judicial Review Would Waste Agency, Judicial, And Public Resources.

Postponing review of the plan's multiple use determination also would be extremely wasteful and inefficient for forest users and the government alike. It takes years and an average of $2.5 million dollars to develop a forest plan. Teeguarden, *Benefit-Cost Analysis in National Forest System Planning: Policy, Uses and Limitations*, 17 Envtl. L. 393, 394 (1987).

Moreover, both the Forest Service and forest users take actions in reliance on forest plans. Typically, each year, the Forest Service develops multiple timber sales across the forest to achieve the plan's objectives. If the forest plan's zoning is defective, the Forest Service may be devoting tens of thousands of dollars to developing these sales in an exercise of futility. In fact, after adoption of the plan, but before this case was filed, the Forest Service proceeded with more than 40 timber sales. *See* Forest Service, Information on Timber Sales Sold on the Wayne National Forest 1988-1997 (lodged with the Clerk). For their part, timber companies, oil and gas companies, recreational outfitters and others may look to the forest plan in making business decisions. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (facial challenge ripe because companies make business decisions based on regulation); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983) (challenge to nuclear power plant moratorium ripe because companies spend large sums of money far in advance of nuclear power plant certification).

The government's preferred approach of relegating all forest plan challenges, like this one, to cases challenging specific timber sales would necessitate countless challenges

to individual projects that may not have overriding independent significance, but which implement the plan's management regime. To obtain review of the Wayne plan's insufficient allocation of land to wilderness recreation, for example, plaintiffs would have needed to challenge more than 40 timber sales and dozens of other activities, such as roadbuilding, utility pole permits, and facilities construction, in areas not designated as management area 6.2. *See, e.g.*, Annual Monitoring and Evaluation Report, LRMP Wayne National Forest, FY 1989, at 2-3 (lodged with the Clerk). Even though plaintiffs' grievance is not with each of these activities in isolation, the government's approach would convert the local district court into a national forest czar overseeing the propriety of each individual action permitted by the plan's flawed management area designations. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (later piecemeal resolution of controversy would be costly and inefficient).

B. Sierra Club Has Standing To Challenge The Wayne Forest Plan's Multiple Use Determination.

1. Sierra Club Is A Proper Party To Bring This Challenge.

It is well-settled that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). There can be no doubt that Sierra Club is a proper party to challenge inadequate wilderness recreational opportunities in the Wayne National Forest because its members regularly engage in such activities. Indeed, in the court of appeals, the government conceded that Sierra Club members actively use and will return to the

Wayne National Forest. Br. at 26-27 n.20.[10]

The government now seeks to impose greater burdens on plaintiffs to demonstrate a particularized linkage to an area that is about to be logged under the plan and to challenge plan decisions only in the context of individual timber sales. Br. at 15, 23 n.17, 41-43 & n.33.[11] This new assertion takes an unduly narrow view of plaintiffs' injuries as limited to the direct effects of logging individual timber sales and of the plan as no more than a series of timber sales strung together. In contrast, plaintiffs' injury is caused by the plan's failure to provide sufficient wilderness recreation opportunities and the consequent intrusive activities occurring throughout the unprotected areas.

Plaintiffs' interests extend beyond the area of each individual timber sale and are harmed by a variety of non-logging activities approved by the plan's land allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, roadbuilding, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation. Those injuries were certainly impending upon adoption of the plan, and they will not go away simply because a few timber sales do not proceed as initially anticipated.

---

[10] *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), is inapposite because, there, it was difficult to predict whether the plaintiffs would be adversely affected by the challenged rule. Here, plaintiffs are clearly affected by the amount and quality of wilderness recreation opportunities in the Wayne National Forest.

[11] While the government is now seeking to channel all plan challenges into litigation over timber sales, it has previously objected to raising plan challenges in the context of a timber sale. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1217 (10th Cir. 1997)(challenge to ASQ); *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 762 n.11 (9th Cir. 1996) (viability claim); *Smith v. U.S. Forest Service*, 33 F.3d 1072 (9th Cir. 1994) (wilderness recommendation issues).

Plaintiffs' affidavits demonstrate that their members use diverse areas of the forest for hiking, camping, bird watching, scientific research, and professional endeavors. One affiant has identified 17 specific areas that he frequents, which are not protected for natural backcountry recreation under the plan. Indeed, he hikes in areas affected by the two timber sales enjoined by the district court.[12] Plaintiffs' members have identified specific and numerous hiking areas that they use and that the plan does not preserve for undisturbed backcountry use. *Cf. Lujan v. National Wildlife Fed.*, 497 U.S. 871, 886-89 (1990) (link to "an immense tract of territory" insufficient for standing).

Article III does not call for an exercise in precision akin to fitting the last piece into a jigsaw puzzle. Where a party's harm derives from a programmatic decision, the party need not prove a separate harm from a particular application of that decision (or as the government asserts, take all steps necessary to mount an independent challenge to that application). *See Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993); *see also* Gov't Br. at 20-21 & n.14 (acknowledging that Article III erects no barrier to facial challenges to regulations or programmatic decisions). For all these reasons,

[12] Plaintiffs or their members administratively appealed one of these sales, as well as at least three others proceeding under the plan. The government's brief (at 36 n.26) refers to two *successful* timber sale appeals, but fails to disclose the other administrative appeals pursued without success in large part because the plan pre-ordained logging in the particular management area. Plaintiffs have lodged copies of the appeal decisions with the Clerk. *See also* Ostrander Aff. ¶ 7 ("The Forest Service rejected opposition to the specific projects in part because the project areas were allocated to timbering in the pending plan"); Tockman Aff. ¶ 6 (same).

plaintiffs are proper parties to mount this challenge.[13]

2. *Plaintiffs' Injuries Were Sufficiently Imminent Upon Adoption Of The Plan To Satisfy The Temporal Component Of Standing.*

The timing issue in this case implicates all three prongs of standing: Is the injury from the plan imminent? Is it the plan, as opposed to an unpredictable intervening action, that causes plaintiffs' harm? Will an order directing a plan revision be likely to redress the injury? *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In this case, the three inquiries merge and confirm plaintiffs' standing because the forest plan's multiple use determination establishes a zoning regime, binding rules, and objectives that dictate harmful on-the-ground activities.[14]

The imminence aspect of standing is satisfied when a plaintiff has sustained an actual injury or is threatened with a real and immediate injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). It has long been settled that "[o]ne does not have to await the consummation of threatened injury

[13] The government tries to justify its rigid justiciability position based on its fear that a court might issue an injunction that is broader than the injuries or claims asserted. Br. at 15, 38-39 & nn. 28-29. It raises the specter of a court enjoining all operations under a forest plan in a case contesting only one aspect of the plan. Of course, a court must balance the equities in determining the scope of an injunction. The government's concerns should be raised in that context, rather than in an attempt to close the door to plan challenges before the issue of remedy even arises.

[14] Prudential standing requirements are satisfied here. The forest plan is a final agency action, *see supra* at 18-20, and Sierra Club's members, as forest users, are among those Congress relied upon to participate in forest planning and challenge agency disregard of the law. *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997); *see supra* at 26-28.

to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

Plaintiffs' injuries from the Wayne forest plan are certainly impending because they flow directly from the plan's management regime. The plan set aside only one management area, comprising 10% of the forest, for wilderness and undisturbed natural recreation. Indeed, the Forest Service acknowledged that the plan would meet barely half the public demand for backcountry recreation. ROD at 29. In management area 6.2, *no* habitat-degrading activities are permitted, and non-essential roads will be closed to promote undisturbed wilderness recreation. Outside management area 6.2, plaintiffs' members will encounter off-road-vehicles, utility corridors, and in many areas, excessive road densities, all of which make remote natural experiences unlikely. Indeed, many intrusive activities, such as opening trails to motorcycles or using heavy machinery, will go forward without any additional consideration of their impact on wilderness recreation. Conversely, affirmative measures to promote undisturbed backcountry recreation, such as closing roads and building additional hiking trails, will take place only in areas targeted for such activities in the plan.

Both the government and petitioners concede that a plan's closure of an area to particular users causes imminent harm to those users. Gov't Br. at 12-13 n.9; Pet. Br. at 17. The flipside is also true. A plan's *failure* to close a trail to motorcycles, for example, causes harm to backcountry hikers whose solitude will be disturbed by revving motors. Because the management regimes challenged here became effective upon adoption of the plan, their harm was similarly immediate. *See Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (8th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (forest plan illegally allowed motorized portages), *further proceedings*, 53 F.3d 881 (8th Cir. 1995).

3. Causation And Redressability Are Satisfied Because The Plan Alters the Legal Regime and The Forest Service Has The Authority To Implement Its Own Plan Regardless of Intervening Third Party Actions.

Not only does the plan immediately impose a particular management regime, but its zoning and objectives drive and substantially influence all forest activities. Indeed, the Forest Service admits, as it must, that the plan has a "significant effect on the nature and extent of subsequent timber harvest activities." Gov't Br. at 15, 31. The Forest Service never disavows the plan. Since the Wayne forest plan established an overriding objective for several management areas that can only be achieved by even-aged logging – *e.g.*, the conversion of mature forest into pasture for game species – logging precipitated by the plan is imminent. ROD at 20 (logging is necessary to accomplish plan's objectives and attain plan's desired future conditions). In fact, from 1988-1991, before the superseding directives, the Forest Service implemented the Wayne forest plan generally in accordance with the projections made in the plan. *Compare* LRMP Table A-1 (plan's timber sale schedule) *with* Forest Service, Information on Timber Sales Sold on the Wayne National Forest, 1988-1997 (the number of timber sales that actually occurred in management areas 2.1, 3.1, 3.2, 3.3, and 6.1 equaled or exceeded the number projected in the plan for these areas).

What the Forest Service emphasizes is that no particular timber sale is certainly impending, not that the occurrence of logging as promised in the plan is unlikely or speculative. While the plan may not be the last decisionmaking step before particular trees will be cut, this Court has never required that the challenged action be the last

link in the chain of causation.

In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), this Court held that irrigation districts and ranchers had standing to challenge a Fish and Wildlife Service biological opinion issued under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), even though the Bureau of Reclamation retained authority to determine whether to reduce water deliveries in accordance with the opinion. The Court rejected the notion that the challenged action must be "the very last step in the chain of causation" where it "alters the legal regime" and produces a "determinative or coercive effect upon the action of someone else." *Id.* at 1164. The biological opinion's incidental take statement had such a coercive effect because of its legal effect under the Endangered Species Act and because federal agencies rarely act in disregard of such opinions. *Id.* at 1164-65.

Here, the forest plan is the Forest Service's blueprint for running the Wayne National Forest. Because the plan establishes the binding rules with which all forest activities must comply, it has "a determinative effect" on forest projects. *See* 16 U.S.C. § 1604(i). If the forest plan prohibited logging, other habitat-degrading activities, and off-road vehicles throughout most of the forest, the plan would itself guarantee additional opportunities for wilderness recreation. For plaintiffs to obtain that same protection through serial challenges to timber sales proceeding in areas suitable for backcountry recreation would require more than a stroke of luck. Indeed, for the Wayne National Forest, it would require defiance of the plan's multiple use determination and abandonment of the plan's objectives for six management areas because the objectives for these areas cannot be achieved without logging. LRMP at 4-74, 4-83, 4-86, 4-97, 4-99, 4-114.

Moreover, the acts necessary to implement the plan according to its terms, and thereby harm plaintiffs, are

entirely within the Forest Service's control. Where third parties are involved, a litigant must show only that the intervening choices of third parties on which plaintiff's injury depends "have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defenders of Wildlife*, 504 U.S. at 562.

Here, the plan embodies the Forest Service's choices about how it will manage the forest. Because the Forest Service has the ability to implement its announced blueprint, plaintiffs' injuries are in no way dependent on speculative inferences about the independent actions of third parties not before the Court. It is far from speculative to assume that the Forest Service will adhere to its overall plan. It would be far more speculative to suggest that the Forest Service will deviate significantly from its announced plan.[15] The chain of causation is more direct and redressability more predictable than in other situations found wanting by this Court. *See, id.* at 568-71 (actions of other agencies and countries receiving U.S. funds for development projects); *Allen v. Wright*, 468 U.S. 742 (1984) (parents' response to private schools' loss of tax exemption).[16]

The government takes great pains to point out that Congress has the power to create a cause of action authorizing

---

[15] Indeed, Ohio Forestry Association urges the Court to decide the merits because timber sales have proceeded and will continue to proceed in accordance with the plan. Pet. Br. at 25-26. This concession reveals that Article III concerns are not the root of petitioner's argument, but instead petitioner simply prefers individual timber sale cases to forest plan challenges (except, apparently, in this instance).

[16] This case is a far cry from those in which the chain of causation was attenuated or implausible. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149 (1990) (death row inmate obtaining new trial and death sentence impacted by appellate review of another inmate's death sentence); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (assumption that plaintiff would engage in illegal activity).

challenges to a regulation or programmatic decision that establishes binding rules governing future government or third-party actions. Gov't Br. at 20-21 & n.14. It cites, for example, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(c)(3), which requires petitions for judicial review of national five-year oil and gas leasing programs to be filed within 60 days of approval, even though intervening, discretionary government decisions are necessary before drilling may actually occur under the program. *See id.* §§ 1337 (granting a lease); 1340(c)(1)(approving an exploration plan); 1351(a)(1)(approving a development and production plan). Similarly, the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1276(a)(1), requires petitions for review of national performance standards governing strip mining to be filed within 60 days of promulgation, even though a mining company must obtain a permit from the state or federal government before such performance standards will have concrete, on-the-ground impacts in any particular area. *Id.* § 1256(a). Neither standing nor ripeness principles have precluded challenges to OCSLA five-year plans or SMCRA performance standards. ***See Natural Resources Defense Council v. Hodel***, 865 F.2d 288, 303-04 (D.C. Cir. 1988) (OCSLA); *National Wildlife Fed. v. Hodel*, 839 F.2d 694, 703-16 (D.C. Cir. 1988) (SMCRA).

Similarly, Article III presents no obstacle to judicial review of this forest plan challenge. Indeed, in contrast to these other statutory schemes, the Forest Service can implement its forest plan regardless of the actions taken or not taken by independent third parties. In sum, because the forest plan's zoning regime and management objectives dictate not only which activities are permissible in particular areas, but also which ones are necessary to achieve the plan's objectives, plaintiffs' challenge to the plan's multiple use determination and zoning regime is justiciable.

C. Deviations From The Plan Due To Superseding Direction Or Law Do Not Render This Case Moot or Otherwise Nonjusticiable.

Both the Forest Service and the Ohio Forestry Association suggest that the justiciability of this case is undermined in hindsight by the Forest Service's deviations from the plan in recent years. Gov't Br. at 30-31 n.23, 40; Pet. Br. at 22-23. However, the converse is true. When plaintiffs filed this case in 1992, their administrative appeals had been denied, resulting in a final agency action ripe for review.

Moreover, from 1988 until March of 1992 when plaintiffs filed this case, the Forest Service proceeded with more than 40 timber sales, corresponding roughly to the plan's projections of the number of sales and types of logging methods both overall and in particular management areas. *See* Forest Service, Information on Timber Sales Sold on the Wayne National Forest, 1988-1997; LRMP, Table A-1. Indeed, before the filing of this case, the Forest Service proceeded with over 30 even-aged management timber sales to meet the plan's objectives of producing timber and converting mature forest into pasture-like habitat for game species outside management area 6.2. Two such timber sales proceeded in management area 6.1, which, although set aside for nonmotorized recreation, nonetheless is subject to logging under the plan. *See also* Fiscal Year 1989 Monitoring and Evaluation Report, *supra* at 30 (countless other activities proceeded in accordance with the plan). The plan's early track record underscores the plan's determinative effect and the harm that had already occurred to plaintiffs' interests when they filed this lawsuit.

The Forest Service's subsequent divergence from the plan occurred because of intervening national policy direction

limiting clearcutting and appropriations riders beginning in fiscal year 1991 prohibiting the level of clearcutting envisioned under the plan. *See* Memorandum from F. Dale Robertson, Chief of Forest Service, to Regional Foresters, Re: Ecosystem Management of the National Forests & Grasslands (June 4, 1992) (directive would likely restrict clearcutting to 70% of 1988 levels); *see, e.g.*, Department of the Interior & Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, 101st Cong., 2d Sess., Tit. II, 104 Stat. 1942 (1990) (limiting clearcutting to 25% of 1989 levels). The legislative history to the first appropriations rider explains that Congress disagreed with the forest plan's emphasis on clearcutting and other even-aged logging and directed "that clearcutting must be reduced on . . . the Wayne National Forest[] to prevent damage to sensitive lands, decreases in visual quality, and fragmentation of forested lands." H. Conf. Rep. No. 101-971, 101st Cong., 2d Sess. 56-57 (1990). Logging levels subsequently declined because of the superseding directive and laws, not as a result of individual timber sale decisions.

The fact that a later change in the law may override a forest plan does not render a challenge to the plan upon its adoption nonjusticiable. Instead, the change may render such a challenge moot, if it fully supplants the challenged aspects of the plan. Here, the Wayne Forest Supervisor has now decided to overhaul the plan to bring it in line with the superseding changes in direction. *See supra* at 14. Once the existing plan is superseded by a revised plan, this case will be moot. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (case moot where intervening "events completely and irrevocably eradicated the effects of the alleged violation"). However, as long as the old plan is still being implemented, it embodies the controlling management regime and thus, it continues to be properly subject to challenge.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE WAYNE FOREST PLAN IS ARBITRARY AND CAPRICIOUS.

A. The Wayne National Forest Plan Arbitrarily Favors Logging And Motorized Recreation Over Wilderness Recreation.

The Sixth Circuit's holding that the Wayne forest plan is arbitrary and capricious is amply supported by the record. As the court of appeals observed, the Forest Service "arbitrarily undervalu[ed] the recreational value of wilderness," ignored the widespread availability of cut-over habitat in and around the Wayne National Forest, and thereby "created a very distorted picture of the Wayne National Forest . . . [and became] improperly predisposed toward clearcutting." Pet. App. at 5a-6a. By ignoring public demand for wilderness and the prevalence of game species and hunting in the region, the plan reached a multiple use determination that arbitrarily endorsed even-aged logging in order to create even more habitat for game species. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious to ignore relevant evidence and to justify decision with reasoning that runs counter to the evidence).[17]

---

[17] The Sixth Circuit's finding of bias referred to this arbitrary cost-benefit analysis and is well-documented in the record. Pet. App. at 3a, 5a-6a. Any broader statement about "opportunities for the intrusion of bias" is *dictum* not subject to review by this Court. Pet. App. at 7a; *id.* at 9a (concurrence described speculation about overall Forest Service bias as "unnecessary" to the decision); *see Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (Court refused to review broad statements in court of appeals decision pertaining to university programs not directly at issue in the case).

Under the second stage of NFMA's three-stage suitability analysis, the Forest Service assessed the direct costs of and receipts from the options for the forest's timber program. *See* 36 C.F.R. § 219.14(b). In doing so, the agency projected that the bulk of the timber program on the Wayne National Forest would lose money, and its initial analysis of the monetary costs and benefits alone showed that *none* of the forest should be assigned to timber production. DEIS at B4-8 to B4-13; B6-24; B6-30.

Under NFMA, money-losing timber sales may be justified only if they promote other forest objectives. 36 C.F.R. § 219.14(c). Accordingly, in the third stage of the NFMA suitability analysis, the Forest Service purported to assess the extent to which logging could be justified for its benefits to other forest uses, such as outdoor recreation and wildlife habitat. 36 C.F.R. § 219.14(c); 219.12(e)-(h).[18]

To justify money-losing timber sales, the Forest Service concluded that clearcutting and other even-aged logging would promote such non-economic benefits as biodiversity, recreational opportunities, and visual quality in the form of open vistas. *See* ROD at 21; FEIS 2-16; DEIS 2-86. In particular, the Forest Service lauded clearcutting's benefits to hunting and chose this type of logging as a

[18] Ohio Forestry Association (at 36-37) mistakenly reads *United States v. New Mexico*, 438 U.S. 699 (1978), as holding that MUSYA elevated timber production over other forest uses. To the contrary, *New Mexico* recognized that MUSYA "broaden[ed] the purposes for which the national forests [would be] administered" to include recreation, fish, and wildlife. *Id.* at 713. The language embraced by petitioner pertained to the Court's determination of the extent to which the Organic Act - the statute establishing certain national forests, but not the Wayne National Forest - impliedly reserved water rights. *Cf.* Weeks Act, 16 U.S.C. § 515 (authorizing establishment of national forests, including the Wayne National Forest, to protect watersheds of navigable streams).

preferred method for converting mature forest into foraging habitat for game species. FEIS 2-16 ("hunters benefit from increases in game populations due to habitat improvements obtained through timber harvest by the clearcutting method"). As a consequence, logging became the mechanism for promoting two plan objectives – timber production and recreation. ROD at 21; DEIS at A-15, B3-43.

Because of this thumb on the benefits side of the scale, logging came to be viewed as overwhelmingly beneficial and the dominant tool for implementing the plan. Indeed, the Forest Service concluded: "[T]he most economically viable means of achieving desired wildlife habitat diversity in portions of the Forest is through timber harvest." ROD at 15. Settling on the most effective means to convert mature forest into pasture, the plan favored even-aged logging, which removes all or nearly all trees in a block. ROD at 15, 20, 28-29. It was but a small step to prefer clearcutting over other even-aged methods.

NFMA, however, charges the Forest Service with selecting the plan "alternative that comes closest to maximizing net public benefits," including recreation and environmental protection. 36 C.F.R. § 219.12(f). In order to make such a selection, the Forest Service must assess the impacts of logging on *all* forest uses, not simply on those uses that may be promoted by logging. *Id.* §§ 219.12(g)(1) (suitability analysis must calculate both economic and noneconomic benefits, including wilderness and protection of environment); 219.21(d) (Forest Service must assess impacts of recreational activities on other multiple uses and quality of experience). Contravening this mandate, the Forest Service arbitrarily placed a high value on wildlife and recreational opportunities that thrive as a result of logging without considering the costs of these activities to recreation and wildlife that depend on undisturbed forest. Under this skewed approach, it is not surprising that the plan alternative

that emphasized wilderness recreation and maintaining the forest in its natural state ranked the lowest in the value assigned to wildlife and recreation benefits. ROD at 31; DEIS B8-8, B3-39.

The Forest Service defines areas suitable for wilderness recreation, which it calls "semi-primitive non-motorized recreation," as blocks of 2500 acres or more in a predominantly natural environment, where concentrations of users are low, signs of human activity are subtle and infrequent, and motorized use of all roads is prohibited. LRMP at 4-124; DEIS E-23. By definition, therefore, even-aged logging, motorized recreation, and other activities that interfere with the natural environment or fragment the landscape have adverse impacts on wilderness recreation. Inexplicably, although the Forest Service at one point acknowledged that logging, particularly clearcutting, interferes with wilderness recreation, *see* LRMP at 3-2, its suitability analysis failed to incorporate the *costs* of logging to old-growth species, to wilderness recreational opportunities, or to those who prefer the visual quality of old-growth forest to that of a clearcut. *See* ROD at 31.

The agency's suitability analysis rested on this one-sided cost/benefit assumption, even though the agency recognized the high demand for wilderness recreation: "Many people look to the forest to provide a place for recreation where human presence and developments are not readily evident. Elsewhere in the State, this type of recreation is in short supply." LRMP at 3-2; *see also* ROD at 10. Indeed, the agency identified "a state shortage for many forest type recreation opportunities:"

> Boating, camping, fishing and hiking are activities which are popular with a great portion of Ohio families, and only about 50 percent of the demand is being met by current facilities. . . . Larger "blocks" of

> public land which can support activities that allow people to get away from vehicles, businesses, and crowds are in demand.

DEIS 3-26. Despite this unmet demand, the Forest Service viewed logging exclusively as beneficial for recreation and biodiversity.

Not only did the Forest Service simply assume that logging would provide unmitigated benefits, despite its interference with wilderness recreation, but the agency also ignored the extent to which existing conditions already satisfy demand for various types of nonwilderness recreation. *See* 36 C.F.R. § 219.21(e) (plan alternatives must be formulated to avoid duplication of recreational opportunities on state and private lands). Cut-over habitat and the species that thrive in such habitat already exist in relative abundance on the land surrounding the Wayne National Forest. ROD at 16 (existing open, agricultural, and young timber forests on state and private land provide abundant game habitat). In contrast, recreational opportunities and wildlife species that depend on large, undisturbed tracts of forest are in short supply. Indeed, the Forest Service interdisciplinary team — the agency's own experts — asserted that the local value of wilderness recreation greatly exceeded the value used in the agency's suitability analysis "because of the limited opportunity [for wilderness recreation] in southeastern Ohio." DEIS at B4-17.

Moreover, in a 1985 decision on a forest plan appeal, the Secretary of Agriculture elaborated on the suitability analysis required to justify money-losing timber sales. *USDA Decision on Administrative Appeals of Forest Plans for the San Juan, Grand Mesa, Uncompahgre, & Gunnison National Forests*, at 6 (1985) ("San Juan Decision") (Sierra Club Record, Vol. 3, Tab 78). In particular, the following questions must be addressed:

> Are the non-timber multiple use benefits to be achieved through the timber program really needed?
>
> Do projections of demand for these non-timber objectives support the need for the Federal expenditures required to achieve them?
>
> Is the timber program as currently proposed actually the most cost effective way to achieve the non-timber multiple use objectives of the plan?

Id. at 8-9. Other forest plans have been found defective for failing to conduct this analysis. *See Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (administrative appeal decision remanded plan for further analysis of below-cost sales); *Citizens for Environmental Quality v. Espy*, 731 F. Supp. 970, 986-88 (D. Colo. 1989) (arbitrary for forest plan to sidestep this analysis).

Here, the Forest Service failed to conduct the required analysis. Instead, it assigned positive values to logging as contributing to recreational goals, without assessing the costs of logging to wilderness recreation or the already ample supply in the region of recreational opportunities and wildlife that benefit from logging.

As a result of over-emphasizing logging and under-emphasizing wilderness recreation, only 10% of the forest is designated for undisturbed wilderness recreation. Conversely, five of the largest management areas, covering over 75% of the forest, are designated for off-road vehicle use and/or even-aged logging – both of which interfere with wilderness recreation. LRMP at 4-83, 4-91, 4-97, 4-104, 4-119; *see also* ROD at 18 (plan made even-aged logging the primary logging method on 80% of the forest suitable for logging); LRMP at 3-5 (same).

In its brief, the Forest Service points to an increase in the acreage assigned to wilderness recreation in the final plan.

Gov't Br. at 48-49. Even after that increase, however, the plan met only half of the projected demand for such recreation. ROD at 29. In contrast, the plan would satisfy 95% of projected demand for hunting, 100% of the demand for off-road vehicle use, and 86% of the demand for developed recreation. LRMP at 2-4 to 2-5. The Forest Service's band-aid approach did not address the crux of plaintiffs' objection: that the entire multiple use determination was fundamentally skewed by the undervaluation of wilderness recreation, the failure to consider the prevalence of hunting and motorized recreational opportunities elsewhere in the region, and the consequent assignment of far too little of the forest to wilderness recreation.

B. The Court Need Not Reach the Clearcutting Optimality Issue.

This Court need not decide what analysis must be undertaken in a clearcutting optimality determination because the optimality of particular logging methods in various ecological conditions is not at the heart of this case. 16 U.S.C. § 1604(g)(3)(F). Instead, plaintiffs' grievance is with the plan's multiple use determination which establishes objectives for the forest's desired future condition, that can only be achieved through even-aged logging that converts mature forest into pastures and short changes wilderness recreation. *See supra* at 41-46; 36 C.F.R. § 219.27(b)(1) (logging prescriptions must be best-suited method to meet multiple use goals for the area).

The Forest Service's overemphasis of logging's benefits to game habitat and recreation predetermined a site-specific preference for even-aged logging, and even for clearcutting as the even-aged management technique of choice. As the Sixth Circuit concluded, however,

"clearcutting loses its value" in the "particular environment of the Wayne National Forest because it will not stimulate the recreational opportunities in demand and. in fact, will harm fishing and hiking." Pet. App. at 6a. A renewed suitability and multiple use determinatien that properly values wilderness recreation would almost certainly eliminate the plan objectives and incentives that favor clearcutting.

On its face, the Wayne forest plan purported to determine that clearcutting is the optimal logging method for certain tree types, slopes, and soil conditions. LRMP, App. C. However, the Forest Service subsequently backtracked in its decisions on the plan administrative appeals, in the Chief's clearcutting directive, and in the Forest Supervisor's promise to revamp the plan's logging program. *See* Pet. App. at 76a, 98a-99a; *see supra* at 14, 39-40. Accordingly, for an ultimate resolution of this case, it may be unnecessary to review the plan's clearcutting optimality analysis.

The Court need not reach out to decide the clearcutting optimality issue in the abstract based on a fear that the Sixth Circuit decision will revolutionize NFMA's approach to clearcutting. Pet. Br. at 25-26. Ohio Forestry Association makes much of the Sixth Circuit's statement that NFMA limits clearcutting to exceptional circumstances. Br. at 36-48. Whether NFMA favors or disfavors clearcutting and even-aged logging is no more than a semantical debate over how to characterize NFMA's constraints. NFMA itself lays out the applicable standard: even-aged logging can be used only where it is "appropriate' to meet the plan's objectives, it complies with limits imposed on the maximum sizes of logging blocks, and the logging is compatible with environmental resource protections and regeneration of forest stands. 16 U.S.C. § 1604(g)(3)(F). In addition, clearcutting may be used only where "it is determined to be the optimum method . . . to meet objectives and requirements of the relevant land management plan." *Id.* § 1604(g)(3)(F)(i).

Even the Fifth Circuit decision embraced by petitioners construed this mandate to limit unfettered even-aged management and clearcutting:

> To be sure, these restrictions reflect a congressional wariness towards even-aged management, constraining resort to its use. The sluicing effect of the required inquiries might be described as making a decision to employ even-aged management more difficult.

Sierra Club v. Espy, 38 F.3d 792, 800 (5th Cir. 1994).[19]

---

[19] Contrary to the arguments of petitioner and its *amici*, NFMA imposes constraints on clearcutting, and its legislative history confirms that Congress intended to do far more than repeal the provisions of the Organic Act that led to injunctions against clearcutting. In fact, Congress rejected several competing bills that proposed such a simple, one-sided fix. 122 Cong. Rec. 27,648 (1976) (statement of NFMA co-sponsor Sen. Humphrey). While Congress also rejected bills favoring uneven-aged management, those bills would have gone much further than petitioner admits (at 45 n.24) and either altogether prohibited even-aged logging in the eastern mixed hardwood forests or mandated that uneven-aged logging be dominant on such forests. 122 Cong. Rec. 27,625 (1976); *Sierra Club v. Espy*, 38 F.3d at 799.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

PATTI A. GOLDMAN
TODD. D. TRUE
AMY SINDEN
Earthjustice Legal Defense
705 2nd Avenue, Suite 203
Seattle, Washington 98104
(206) 343-7340

FREDERICK M. GITTES
Counsel of Record
Spater, Gittes, Schulte
& Kolman
723 Columbus Street
Columbus, Ohio 43205
(614) 221-1160

Of Counsel:
ALEX LEVINSON
Sierra Club
85 2nd Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5500

Attorneys for Respondents
Sierra Club and Citizens Counsel
on Conservation and
Environmental Control

Dated: January 26, 1998